FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

MAY 1981
Volume 3
No. 5

DECISIONS

May 1981

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Commission Decisions

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1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

May 11, 1981

RONNIE R. ROSS	:	
	:	
and	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	VINC 78-38
	:	
	:	
v.	:	
	:	
	:	
MONTEREY COAL COMPANY,	:	
McNALLY-PITTSBURGH CORPORATION,	:	
AND LOOKING GLASS CONSTRUCTION	:	
COMPANY	:	

DECISION

This case involves an application for review of allegedly discriminatory conduct in violation of section 110(b) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq (1976)(amended 1977). Ronnie R. Ross alleges that his employer, McNally-Pittsburgh, by placing a letter in his employment file, illegally discriminated against him for engaging in protected activity; and that Monterey Coal Company also is liable for this violation because it caused the letter to be placed in his file, and because it was the owner of the job site. 1/ Following a full evidentiary hearing, the administrative law judge denied the application and dismissed the proceedings. For the reasons that follow, we affirm the judge.

In 1974, Monterey Coal Company began development of the Monterey No. 2 underground coal mine near Albers, Illinois. At the time of the violation alleged in this case, the underground portion of the mine development was completed and coal was being mined. Monterey had contracted with McNally-Pittsburgh, a construction firm, and with several other firms to construct surface facilities and accomplish other related activities at its mine. Ronnie Ross was employed by NcNally from May 1975 until August 1978 at the Monterey site.

1/ Ross also alleged that Looking Glass Construction Company, another independent contractor at the Monterey job site, discriminated against him. The administrative law judge's conclusion that Looking Glass did not violate the Act was not directed for review by the Commission.

From the fall of 1975 until May 1978 Ross was a United Mine of America safety committeeman for McNally employees. In the sp 1977, Ross became chairman of the UMWA Local 2015 safety committ which consisted of the members of each of the Monterey site cont safety committees. While chairman, Ross continued to represent McNally's employees as one of their safety committeemen. He and other McNally committeemen toured their job site monthly and rep safety violations to McNally's management. Toward the end of hi employment, Ross's practice was to prepare requests for inspecti the Mining Enforcement and Safety Administration listing conditi which Ross or his committee believed violated the 1969 Coal Act. When Ross accompanied MESA inspectors on their inspections, he t throughout the entire Monterey project and did not restrict his to the McNally site. 3/

During the latter part of October 1977, an official of Mont Coal Company advised Charles Bradley, McNally's superintendent f construction, that Ross had been observed in the slope area of Monterey's underground operations, an area where no McNally empl were working. Following this incident, Bradley instructed Bob S McNally's project superintendent, to limit the McNally Health an Committee's inspections to McNally's work areas. Other reports Ross's presence in non-McNally work areas were reported to McNal officials.

On November 4, 1977, Ross and his committee conducted a saf inspection and prepared a request for inspection under section 1 This request alleged, among others, safety violations by Looking Construction Company. This request was given to federal inspect November 8 when they arrived to conduct an inspection at the Mon mine site. Ross and another McNally safety committeeman accomp the federal inspectors, as did management representatives from M and Monterey.

During the course of the inspection, an oral confrontation place between Ross and the president of Looking Glass. McNally' struction superintendent Bradley was notified of the incident by the McNally supervisors on November 8, 1977, or soon thereafter. Bradley instructed project superintendent Stearman to write Ross letter to document previous oral instructions limiting the McNal Health and Safety Committee's activities to McNally's work areas

Subsequently, Ross was given a letter dated November 30, 19 signed by Stearman which stated:

2/ Section 103(g) of the Act gave a representative of the mine right to file a written request for an inspection by MESA if he reasonable ground to believe that a violation of a mandatory sta existed. Upon the receipt of the written request, MESA was requ inspect as soon as possible.

3/ Section 103(h) of the Act permitted an authorized represen the miners to accompany the representatives of the Secretary on inspections.

> This is to advise you that your duties as Project Union Health and Safety Committeeman are limited exclusively to McNally Operations at the Monterey Coal Mine No. 2.
>
> In the event of your violating the above, you will be suspended--Subject to discharge.

This letter forms the basis for Ross's discrimination claim. Ross acknowledged, however, that even after the issuance of the letter, he continued to inspect McNally's and other sites and was not discharged, reprimanded or otherwise penalized. 4/

The administrative law judge found that the disciplinary letter was given to Ross for engaging in activities off his work site not authorized by his employer, and was not issued in retaliation for Ross' reporting of alleged dangers or violations to the Secretary. He therefore concluded that no violation of section 110(b)(1)(A) occurred and dismissed the proceedings.

After a careful review of the record, we are persuaded that the judge's conclusion is supported by the evidence and should not be disturbed. The record supports the finding that the letter was issued to protect a legitimate managerial interest in controlling the activities of its workforce. The judge did not draw the inference, argued for by Ross and the Secretary, that the letter was issued in retaliation for Ross's exercise of rights protected by the Act, e.g., notifying the Secretary of alleged hazards or violations or accompanying federal inspectors during their inspections. The record does not establish that Ross's exercise of his statutory rights in fact was in any way restricted; therefore, we cannot say that the judge erred. 5/ Compare Local Union No. 1110, United Mine Workers of America and Robert L. Carney v. Consolidation Coal Co., 1 FMSHRC 338 (1979).

Accordingly, the decision of the administrative law judge is affirmed. 6/

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

4/ We also note that the letter was removed from Ross's employment file prior to hearing, the McNally contract at Monterey is completed, and Ross is no longer employed by McNally.

5/ This decision should not be construed as affirming a policy of limiting safety committee inspections to the employer's area in all circumstances.

6/ In view of our disposition, we need not reach the issue of Monterey's liability as owner for the act of its contractor, McNally-Pittsburgh.

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May 11, 1981

LOCAL UNION NO. 781,
DISTRICT 17,
UNITED MINE WORKERS OF AMERICA :

v. : Docket No. WEVA 80-473-C

EASTERN ASSOCIATED COAL CORP. :

DECISION

The issue in this case is whether miners are entitled to compensation under section 111 of the Federal Mine Safety and Health Act of 197 ("the 1977 Mine Act"), 30 U.S.C. §821 (Supp. III 1979), where a withdrawal order under section 103(k), 30 U.S.C. §813(k), was issued after the miners had already withdrawn from the mine pursuant to their collective bargaining agreement's non-compensated "memorial period." For the reasons stated below, we affirm the judge's finding that on the facts present here there is no entitlement to compensation.

The facts are undisputed. At approximately 1:30 a.m. on March 19, 1980, a miner was fatally injured in the Wharton No. 4 Mine of Eastern Associated Coal Corporation. The Wharton No. 4 miners are represented by the United Mine Workers of America. After the accident, the miners on the midnight shift (12:00-8:00 a.m.) withdrew pursuant to the Union' collective bargaining agreement with Eastern Associated. The agreement provided that following a fatality, miners would be withdrawn and the mine closed for a 24-hour memorial period during which the miners were not contractually entitled to compensation. 1/ At 6:19 a.m. on March 19, after the miners had withdrawn, an MSHA inspector issued a section 103(k) withdrawal order. Section 103(k) provides in pertinent part:

> In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, ... may issue such orders as he deems appropriate to insure the safety of any person in the ... mine....

1/ Article XXII, section (k) of the parties' agreement, the National Bituminous Coal Wage Agreement of 1978, stated:

> "[W]ork shall cease at any mine on any shifts during which a fatal accident occurs, and the mine shall remain closed on all succeedin shifts until the starting time of the next regularly scheduled wor of the shift on which the fatality occurred."

The Union concedes that miners are not contractually entitled to pay during such memorial periods. Br. 2.

offered to, or did, return to work at any time during the memorial period.

The Union subsequently filed a complaint for compensation under section 111 of the 1977 Mine Act. Section 111 provides in pertinent part:

> If a coal or other mine ... is closed by an order issued under section 103, section 104, or section 107, all miners working during the shift when such order was issued who are idled by such order shall be entitled ... to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift....

The Union sought 1.68 hours of compensation for the March 19 midnight shift and 4 hours of compensation for the immediately following March 19 day shift (8:00-4:00) -- that is, for the time the 103(k) order was in effect on the midnight shift (6:19 to 8:00 a.m.) and for four hours of the following day shift. The administrative law judge granted Eastern Associated's motion for summary decision and dismissed the proceeding. 2 FMSHRC 3422. The judge held that section 111 compensation is awardable only for pay lost when miners are idled as a result of one of the designated orders. He found that these miners were idled because they honored their memorial period, during which they were not entitled to pay, and that, therefore, the section 103(k) order issued after their memorial withdrawal did not idle them and statutorily entitle them to compensation. Id. at 3423-3424. We affirm.

Addressing first the purpose of section 111, we are persuaded, as was the judge, by the statute's plain language and its legislative history that Congress intended section 111 to provide limited compensation solely for regular pay lost because of issuance of one of the designated orders. In relevant part, section 111 states that miners are entitled to compensation only if they are "idled by" a section 103(k) withdrawal order. This language clearly indicates that there must be a nexus between the miners' idlement and the issuance of the section 103(k) order. Section 111 also makes clear that the statutory compensation applies only against such regular rates of pay as the miners would have earned "during the period" of idlement had the order not been issued or had the reasons leading to their idlement and to the order not occurred.

In addition, the compensation limits in section 111 also convince us that the section does not authorize an independent award of pay or damages, but rather only a partial recompense for lost earnings. The relevant compensation clauses of section 111 state that miners are entitled "to full compensation by the operator ... for the period they are idled, but not for more than the balance of each shift" and that if the withdrawal order is not terminated prior to the next working shift, all idled miners on that shift "shall be entitled to full compensation ... but for not more than four hours of such shift." Had Congress intended section 111 to create a source of independent pay or damages, it would not have so limited the compensation to only a portion of pay. 2/

This result is buttressed by the report of the Senate Committee which largely drafted the 1977 Mine Act:

> [T]he primary objective of this Act is to assure the maximum safet and health of miners. For this reason, the bill provides ... that miners who are withdrawn from a mine because of the issuance of a withdrawal order shall receive certain compensation during periods of their withdrawal. This provision, drawn from the Coal Act, is not intended to be punitive, but recognizes that miners should not lose pay because of the operator's violations, or because of a imminent danger which was totally outside their control. It is therefore a remedial provision which also furnishes added incentiv for the operator to comply with the law. [S. Rep. No. 95-181, 95t Cong., 1st Sess. 46-47 (1977), reprinted in Legislative History of Federal Mine Safety and Health Act of 1977, at 634-635 (1978). (Emphasis added.)]

The Senate report not only focuses on the considerations discussed above, but also points out the strong incentive which the section furnishes operators to comply with the 1977 Mine Act's safety requirements. Regarding the section's safety purposes, we also find the Third Circuit's observations in Rushton Mining, below, concerning former section 110(a) of the 1969 Coal Act (n. 2 below) fully applicable to section 111:

> By giving [miners] ... compensation--albeit very limited--for work lost as a result of withdrawal orders, [the section] encourages miners to report dangerous conditions [and for] the same reason, ... removes a potential impediment to the inspector's actually issuing withdrawal orders.

2/ The Interior Board of Mine Operations Appeals also interpreted section 111's predecessor provision in the Federal Coal Mine Health and Safety Act of 1969, ("the 1969 Coal Act"), 30 U.S.C. §801 et seq. (1976)(amended 1977), former section 110(a), to authorize only limited compensation for earnings lost because of a withdrawal order. Cf. UMWA, Loc. Union No. 1993 v. Consolidation Coal Co., 8 IBMA 1, 7-10 (1977). To similar effect are the Third Circuit's observations in Rushton Mining Co. v. Morton, 520 F.2d 716, 720-722 (1975).

In sum, section 111 compensation is awardable only if the nexus between a designated withdrawal order and the miners' ic loss of pay, or between the underlying reasons for the idlemer loss and the reasons for the order. Mere occurrence alone of or idlement and issuance of an order does not, by itself, just compensation. This case does not require us to attempt an exh definition of all conceivable relationships between withdrawal and idlement sufficiently substantial to support a section 11 Where an order precedes and plainly causes a withdrawal leadi of pay, compensation ordinarily will be awarded; conversely, section 103(k) order were issued while miners were out of the preceding economic strike, or where the order has nothing to withdrawal or there was no pre-existing private claim to pay, will not be awarded. However, withdrawal situations can aris more complicated sequences of events or concurrent operation factors. In resolving the latter class of cases, we think it develop the nexus rule on a case-by-case basis. In such cases examine the relationship between the underlying reasons for t drawal and for the order, and will give balanced consideratio the limited and purely compensatory character of section 111 overall safety purposes of the 1977 Mine Act and section 111 Section 111 is designed to promote safety and protect lives, work stoppage due to safety concerns precedes an order and is by the same exigent or emergency conditions leading to the or compensation may be justified to effectuate those safety purp Peabody Coal Co. v. MSHA, 1 FMSHRC 1785, 1786-1788, 1790 (197 UMWA, Dist. 31 v. Clinchfield Coal Co., 1 IBMA 33-35, 40-41 (cases permitting compensation under former section 110(a) of Coal Act where a work stoppage in the face of emergency condi preceded the withdrawal orders). We now apply these general to the specific question on review. 3/

The undisputed facts show that the miners left the mine hours prior to the issuance of the section 103(k) withdrawal agree with the judge that the cause of the miners' departure hour memorial provision of the 1978 collective bargaining agr

3/ In analyzing former section 110(a) of the 1969 Coal Act, previously adopted a similar nexus rule and held that miners within the meaning of section 110(a) if "but for the withdraw they would have worked and been paid. See, for example, Loca 5869, Dist. 17, UMWA v. Youngstown Mines Corp., 1 FMSHRC 990, While the "but for" language is a helpful guide to resolving ship problems in both section 110(a) and 111 cases, it was no nor can it, be a definitive verbal formula. As we have indic must also handle such cases by balancing the policy considera discussed above.

Furthermore, because the miners observed the non-compensated memorial period, we cannot say that they would have been paid by Eastern Associated had the withdrawal order not been issued. Under these circumstances, the section 103(k) withdrawal order was merely an event that occurred while the memorial period was being observed. Since the order did not cause the miners' withdrawal and since they placed themselves in a position where they would not have been paid in the order's absence, we do not find a relationship between the order and idlement sufficiently substantial to justify an award of section 111 compensation. We again emphasize that there is no evidence that the withdrawal was independently justified by exigent circumstances or amounted to a protected work refusal.

We cannot agree with the Union's contention that denial of section 111 compensation would "supplant [the 1977 Mine Act] with a contract provision." Br. 3. It is true that we do not decide cases in a manner which permits parties' private agreements to overcome mandatory safety requirements or miners' protected rights; nor do we unnecessarily thrust ourselves into resolution of labor or collective bargaining disputes. See Youngstown Mines, supra, 1 FMSHRC at 993-995. However, section 111 requires us to determine whether there is a pre-existing private entitlement to pay. To make that determination, we are occasionally obliged to examine the parties' collective bargaining agreement which fixes pay rights. In addition, as here, we must sometimes look to the agreement to understand the reasons for a private withdrawal. In the present case, there is no need for contract interpretation because the parties are agreed that the miners withdrew pursuant to the memorial provision and have stipulated that under that provision the miners were not entitled to pay from Eastern Associated during the memorial period. Similarly, the Union's reliance (Br. 2-3 & nn. 2 & 3) on certain recitations in the contract that neither party waives its 1977 Mine Act "rights" would incorrectly transform section 111 into a statutory indemnity against absence, loss, or surrender of private pay entitlements. While the Union gave up a private claim to pay, it has not waived any statutory entitlement.

For the foregoing reasons, we affirm the decision of the judge.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

May 12, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 79-397-M
RALPH FOSTER AND SONS	:	

DECISION

We directed this case for review to determine whether the administrative law judge erred in vacating a citation after he had found a violation of 30 CFR §57.15-4. 1/ The citation issued November 3, 1978, listed the mine as Erda CG-27 and stated that two men were drilling at the face without safety glasses or eye protection of any kind. The judge found the violation had occurred but vacated the citation because "MSHA failed to prove the mine involved in the violation." Dec. at 3.

In his answer to the Secretary's petition for assessment of civil penalties, Robert Foster, the owner of Ralph Foster and Sons, averred that the Erda CG-27 mine had been operated in 1975, but not since that year. The answer also alleged that, in the mine to which the citation may have referred, the miners were cleaning their glasses at the time of inspection, and did not violate any regulations. At the hearing Foster testified that MSHA, at an unspecified time, sent two inspectors to clear up the confusion regarding the mine name, and he and the inspectors "agreed that Erda CG-27 must be the mine that we called G-3." Tr. 29. He also stated that he thought the inspector was talking about G-3 when referring to the alleged violation. Tr. 32-33.

This record clearly indicates that the question of the proper identification of the mine was litigated and the operator knew at which mine the violation occurred. A technical defect in the citation which did not prejudice the operator in presenting his defense, and which, in effect, was cured at the hearing should not prevent a finding of liability. Jim Walter Resources and Cowin and

1/ 30 CFR §57.15-4 provides:
Mandatory. All persons shall wear safety glasses, goggles, or face shields or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes.

Company, 1 FMSHRC 1827 (1979). See also Old Ben Coal Company, 2 FMSHRC 1187 (1980). We hold that the judge erred in vacating the citation.

Accordingly, the citation is reinstated and the case is remanded for the assessment of a penalty.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

May 18, 1981

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEVA 81-109-M
v.	:	
POCAHONTAS CONSTRUCTION COMPANY Respondent	:	

DIRECTION FOR REVIEW AND ORDER

The administrative law judge's Order of Default issued on April 8, 1981, is directed for review. 30 U.S.C. § 823 (d)(2)(A)(ii)(IV). The issue is whether, under the circumstances presented, the judge's finding that Respondent failed to respond to a Show Cause Order and waived its right to a hearing is appropriate.

On December 12, 1980, the Secretary of Labor filed a Petition for Assessment of Civil Penalty against Pocahontas Construction Company, seeking penalties totaling $122.00 for three alleged violations of the Act. No answer was filed. On March 4, 1981, the chief administrative law judge issued an order to Pocahontas to show cause, within 15 days, why it should not be deemed to have waived its right to a hearing and why the proposed penalties should not be entered as a final order of the Commission and collection procedures initiated. The record does not disclose any proof that service of this Order was actually made on Pocahontas. On April 8, 1981, the judge issued an Order of Default finding Pocahontas failed to respond to the Show Cause Order issued March 4, 1981, holding Pocahontas in default, assessing the proposed penalties of $122.00 as the final order of the Commission and ordering payment within 30 days.

On April 20, 1981, Pocahontas filed its Motion to Set Aside Order of Default alleging, in part, that it had no knowledge of the March 4, 1981 Order to Show Cause, that it had been denied due process and that it be allowed a hearing. Pocahontas' motion is accepted as a timely petition for discretionary review.

Although Respondent failed to file an answer to the Secretary's Petition for Assessment of Civil Penalty as provided by Commission Rule 2700.28, before the entry of any Order of Default, Commission R 2700.63(a) requires "an order to show cause shall be directed to the party." A Show Cause Order does not serve its intended purpose if r received by the party required to respond. Here, Respondent alleges did not receive the show cause order of March 4, 1981, and there is proof in the record to the contrary. Under these circumstances a serious question of service arises and we are not prepared to summar rule whether service in fact was made. In view of the fact that ent of a default judgment is harsh and a dispute exists as to receipt of the order to show cause precipitating the judgment, we are of the opinion that the matter should be remanded.

Accordingly, the judge's Order of Default is vacated and the ca is remanded for further proceedings.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

Marian Pearlman Nease, Commissio

A. E. Lawson, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

May 18, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	
v.	:	Docket No. VINC 74-157
OLD BEN COAL CORPORATION	:	IBMA 76-90

DECISION

Old Ben Coal Corporation initiated this proceeding by filing an application for review of an order of withdrawal issued March 6, 1974, under section 104(c)(2) of the Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976)(amended 1977). The order alleged that Old Ben had violated 30 C.F.R. §75.400. Following a hearing, the administrative law judge determined that a complete inspection of the mine, disclosing no similar violations, intervened between the issuance, on November 15, 1972, of the underlying 104(c)(1) notice and order and the issuance of this 104(c)(2) withdrawal order. Accordingly, the judge vacated the withdrawal order. The appeal of the Mining Enforcement and Safety Administration (MESA) was pending before the Interior Department Board of Mine Operations Appeals on the effective date of the Mine Safety and Health Act of 1977 and, therefore, is before this Commission for disposition. 30 U.S.C. §961 (Supp. III 1979).

In holding that a complete inspection of the mine had occurred the judge stated, "The record is clear that the entire underground mine was inspected by this series of spot health, safety, health and safety, ventilation and [section] 103 inspections and that no section 104(c)(2) orders were issued during this series." Dec. 12. We have carefully reviewed the evidence and conclude that the judge's finding is supported by the record. Accordingly, the decision is affirmed. 1/

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

1/ See CF&I Steel Corp., 2 FMSHRC 3459 (1980).

Editors Note: A copy of the Administrative Law Judge's Decision is attached. 1166

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United States Department of the Interior

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April 29, 1976

OLD BEN COAL CORPORATION,	:	Application for Review
Applicant	:	Docket No. VINC 74-157
v.	:	Order No. 1 HG; March 6, 1974
MINING ENFORCEMENT AND SAFETY ADMINISTRATION, (MESA),	:	Mine No. 24
Respondent	:	
UNITED MINE WORKERS OF AMERICA,	:	
Respondent	:	

DECISION

Appearances: Vilma L. Kohn, Esq., Squire, Sanders and Dempsey, Cleveland, Ohio, for Applicant;

Frederick W. Moncrief, Esq., Office of the Solicitor Department of the Interior, for Respondent MESA.

Before: Administrative Law Judge Steiner

PROCEDURAL BACKGROUND

This action was brought by the Applicant pursuant to Section 105 of Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. § 815 after referred to as the Act) for review of an Order of Withdrawal on March 6, 1974 under § 104(c)(2) providing, inter alia, as foll

> Coal float dust ranging from a distinct black in color to 1/2 inch deep was deposited on rock dusted surfaces in the 61st north belt haulage entry from the belt head roller to the belt tail piece, and in the adjoining crosscuts along belt a distance of approximately 2000

feet, there was also coal spillage along west side of 61st north belt, from 2 to 10 inches deep, and from drive to 800 foot survey tag.

There has been a violation of § 75-400 of Part 75 Title 30, Code of Federal Regulations, a mandatory health or safety standard, but the violation has not created an imminent danger.

The violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and is caused by an unwarrantable failure to comply with such standard.

The violation is similar to the violation of the mandatory health or safety standard which resulted in the issuance of Withdrawal Order No. 1 J.A.R. on November 15, 1972, and no inspection of the mine has been made since such date which disclosed no similar violation.

inspector Harry Greiner served the subject Order at 5:30 p.m. on 6, 1974 on J. Green, Mine Manager on the third shift at Mine No. 24. Order closed the 16th north belt haulage entry. The conditions were ed and the Order terminated at 3:00 p.m. on March 7, 1974.

original application for review was filed on March 18, 1974. The ed Mine Workers of America filed an answer in opposition to the appli- on on March 21, 1974. MESA filed an answer on April 1, 1974. A ing was held in St. Louis, Missouri. Charles Mauzy and Guy Yattoni ified on behalf of the Applicant; Harry Greiner testified on behalf ESA. The United Mine Workers of America made no appearance at the ing. Post hearing briefs were filed by the Applicant and MESA.

Applicant filed an Amended Application for Review on September 23, 1974, essly denying that there was a violation; denying that there was unwar- able failure to comply with any mandatory health and safety standard; alleging affirmatively that there is no valid Order under § 104(c)(1) he Act on which the subject order can be premised; that subsequent ections of the subject mine have disclosed no violations similar to e resulting in the issuance of the underlying § 104(c)(1) Order of drawal; and that the Regulations codified at 30 § 75.400 et seq. were operly promulgated and are therefore without legal force and effect.

FACTUAL BACKGROUND

les K. Mauzy, employed as face foreman by the Applicant, testified he was working on the 61st north belt haulage entry on March 6, 1974; one of his duties is the examination of pre-shift examiner's reports; no mining activities were being conducted on the first section of belt when the Order was issued; that after he was informed of the

closure by the inspector, he assigned four men to clean the belt; that one of the pre-shift reports dated 3/6 indicated there had been spillage at certain spots on the belt which should be cleaned; that other pre-shift reports indicated that the belt was clean; that in his 28 years of experience in mining coal, he had never seen one-half inch of float dust extending for a distance of 2,000 feet; that such an accumulation would take six months or more; that he had examined the belt "probably" a week before the Order was issued and determined that there was insufficient float coal dust on the belt to justify it to be "written up on the examiner's books" (Tr. 30); that the belt had been machine dusted; that the rock dust on the floor along the belt line was quite thick, two to two and one-half inches in some places; that the color was light gray which would indicate a film of float dust on top of the rock dust; that one belt shoveler was permanently assigned to the 2,000-foot belt on every shift; and that he did not believe water sprays had been installed on the subject belt on March 6th.

Guy Yattoni, witness for the Applicant, testified that in the 10 years of the existence of Mine No. 24, there had never been a gas ignition, dust explosion, gas explosion, or sudden release of gas necessitating evacuation; that, in his 42 years of experience in coal mining, he had never seen a blanket of coal dust one-half inch thick extended over a distance of 2,000 feet; and that such accumulations occur in isolated pockets and at dumping points.

Inspector Harry Greiner testified that he was making a regular inspection, walking all belt haulage entries when he noticed that there were no water sprays installed to alleviate float coal dust at the belt head of the 61st north belt where it dumps on the west belt and thereupon issued a 104(b) notice; that, as he proceeded up along the 61st north belt, "on the framework of it, there was quite a bit of float coal dust and along close to the ribs where it is kind of a triangle shape, where the ribs meets [sic] the bottom, * * * float coal dust did range up to half an inch in depth on this framework (of the belt drive) and over close to the ribs"; that as he proceeded on up the entry to the tailpiece of the belt, the floors were very black and the floors were also black in the crosscuts on either side of the belt; that the specific areas where he found accumulations of one-half inch of float coal dust was where the belt ran through an overcast, perhaps eighty or one hundred feet and on the framework of the drive itself; that there was float coal dust on the floor along the ribs and very little upon the ribs; that he identified the coal dust by its powdery-like texture and very distinct black color; that coal spillage began at the belt drive and went inby for 800 feet on the west side of the belt; that he did observe float coal dust extending 2,000 feet along the belt; that, in his opinion, the spillage on the west side of the belt could be cleaned up in six or seven hours; that he estimated the depth of the float coal dust visually and by continually scratching through it with a flat blade attached to a bar; that he did not measure the size of the float coal dust particles; that the float coal dust could propagate

an explosion; that the presence of the float coal dust did not constitute an imminent danger at the time the Order issued, but could become dangerous if a source of ignition were present; that very few pre-shift examiners even put float coal dust on the book; that a thin film of flo dust is "Dangerous, anticipating if something else happens. * * * It could contribute to a health and safety hazard." (Tr. 70); that he did not cite the operator for inadequate rock dust; that the float coal dus would contribute to the danger of other factors such as an explosion or fire, or the liberation of methane gas.

RELEVANT STATUTORY SECTIONS AND REGULATIONS

1. Section 104(c) of the Act, 30 U.S.C. § 814:

(c)(1) If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any notice given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within ninety days after the issuance of such notice, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a mine has been issued pursuant to paragraph (1) of this subsection, a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those

that resulted in the issuance of the withdrawal order under paragraph (1) of this subsection until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violation, the provisions of paragraph (1) of this subsection shall again be applicable to that mine.

2. Section 75.400 of volume 30 of the Code of Federal Regulations, 30 CFR 75.400:

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

ISSUES

1. What are the elements of a section 104(c)(2) order of withdrawal?

2. Which party has the burden of proof with respect to each element of a 104(c)(2) order of withdrawal?

3. Whether the 104(c)(2) order may be sustained on the basis of the existence of a 104(c)(1) notice and 104(c)(1) order without regard to the substantive validity of the underlying notice and order.

4. Whether section 75.400 was promulgated improperly and is invalid.

5. Whether a violation of 30 CFR 75.400 occurred.

6. Whether the violation was caused by an unwarrantable failure of the Applicant to comply with the regulations.

7. Whether the operator's liability for 104(c)(2) orders ends when a single inspection or series of inspections of the mine discloses no violations similar to those upon which the underlying 104(c)(1) notice and order were based.

ELEMENTS OF A 104(c)(2) ORDER OF WITHDRAWAL

A section 104(c)(2) withdrawal order may be issued if a withdrawal order with respect to any area in the mine has been issued pursuant to section 104(c)(1) and subsequent inspection reveals: (1) that

a similar violation of a mandatory health or safety standard occurred, and (2) that the violation was caused by the unwarrantable failure of the operator to comply with such health and safety standard. The United States Court of Appeals for the District of Columbia Circuit recently held in International Union, United Mine Workers of America v. Thomas S. Kleppe, Secretary of the Interior, et al. (No. 75-1003, April 13, 1976), that there is no gravity criterion required to be met before a section 814(c)(1) withdrawal order may properly issue.

BURDEN OF PROOF

Section 4.587 of Volume 43 of the Code of Federal Regulations, 43 CFR 4.587, 1/ and section 7(c) of the Administrative Procedure Act (A.P.A.) 5 U.S.C. § 556(d), 2/ assign the burden of proof in administrative hearings under the Act.

The burden of proof is divided in proceedings reviewing the validity of section 104(c)(2) withdrawal orders. MESA must establish the fact of violation by a preponderance of the evidence. See Zeigler Coal Co., 4 IBMA 88, 102 82 I.D. _____, 1974-1975 OSHD par. 19,478 (1975). The burden of persuasion with respect to the other elements of the order rests upon the Applicant. Kentland-Elkhorn Coal Corp., 4 IBMA 166, 82 I.D. 234, _____ OSHD par. _____ (1975). Before Applicant must attempt to meet this burden of persuasion, however, MESA must establish a prima facie case that the order was validly issued.

> * * * In the instant case, MESA must make out a prima facie case that the Order in issue was validly issued pursuant to section 104(c)(2) of the Act. Although, as we held above, MESA need not establish the validity of the underlying section 104(c) Notices and orders, it must establish a prima facie case with respect to the section 104(c)(2) chain of citations, the fact of violation, unwarrantable failure, and the other requirements for issuance of a section 104(c)(2) order. Kentland Elkhorn Coal Corp., 4 IBMA at 173.

1/ In proceedings brought under the Act, the applicant, petitioner, or other party initiating the proceedings shall have the burden of proving his case by a preponderance of the evidence provided that * * * (b) wherever the violation of a mandatory health and safety standard is an issue the Mining Enforcement and Safety Administration shall have the burden of proving the violation by a preponderance of the evidence.

2/ Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. * * *

The Board cited Zeigler in support of this holding. Zeigler involved an application for review of a section 104(a) imminent danger withdrawal order. The Board interpreted 30 CFR 4.587 and section 7(c) of the A.P.A. as follows:

> We believe that although that regulation places the ultimate burden of proof on the operator in a review proceeding involving an imminent danger withdrawal order, such regulation nonetheless, does not relieve MESA from the statutory obligation of making out a prima facie case in the first place. If, after MESA establishes a prima facie case, the operator fails to overcome MESA's case by a preponderance of the evidence with respect to each element of proof in dispute, then, MESA prevails and the operator's request for relief must be denied. 4 IBMA at 101.

This decision was cited with approval in Old Ben Corp. v. Interior Board of Mine Operations Appeals, 523 F.2d 25, 39, 40 (7th Cir. 1975), another section 104(a) proceeding:

> * * * in practice, therefore, the burden of proof is split, with the Government bearing the burden of going forward, and the mine operator bearing the ultimate burden of persuasion. We think that this accords with the intent of Congress as expressed in the following Committee comment on Section 7(c) of the Administrative Procedure Act (now codified as 5 U.S.C. § 556(d)):
>
> > That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain. Sen. Doc. No. 248, 79th Cong., 2d Sess., 208, 270 (1946).
>
> Although 43 CFR § 4.587 might have been more artfully drafted, we read it to mean simply that the petitioner who initiates the proceedings--here Old Ben--has the ultimate burden of persuasion. We do not think that the regulation was intended to relieve--nor, indeed, can it relieve--the proponent of an imminent danger order from the burden of putting forth a prima facie case in the administrative hearings.

Pursuant to 43 CFR 4.587 and section 7(c) of the A.P.A., MESA must establish by a preponderance of the evidence that a violation of the mandatory health and safety standards occurred. MESA must also present a prima facie case with respect to the other elements of the 104(c)(2) withdrawal order. Once MESA has established this prima facie case, the burden of persuasion falls upon the operator to establish by a preponderance of the evidence that one or more of the elements essential to a valid 104(c)(2) withdrawal order was not present when the order was issued.

VALIDITY OF UNDERLYING 104(c)(1) NOTICE AND ORDER

MESA introduced into evidence a section 104(c)(1) notice issued September 27, 1972 (Exhibit C), and a section 104(c)(1) order issued November 15, 1972 (Exhibit B), to establish a prima facie case that the required underlying (c)(1) order and notice had been issued (Tr. 51-52). The validity of the precedent notice and order is not in issue in a proceeding for a review of an Order of Withdrawal issued pursuant to section 104(c)(2) of the Act. Zeigler Coal Company, 5 IBMA 346, 352, _____ I.D. _____, _____ OSHD par. _____ (1975); Kentland-Elkhorn Coal Corp., 4 IBMA 166, 171, 82 I.D. 234, 1973-1974 OSHD par. 19,633 (1975).

VALIDITY OF SECTION 75.400

The applicant challenged the validity of 30 CFR 75.400 based on the decis of the Sixth Circuit in United States v. Finley Coal, 493 F.2d 285 (6th Cir. 1974), aff'd 345 F. Supp. 62, 66 (E.D. Ky. 1972). In Union Carbide Corp., 3 IBMA 314, 81 I.D. 532, _____ OSHD par. _____ (1974), the Board held that Finley does not hold that section 75.400 was invalidly promulgated and that operators may be cited for violations of that regulation.

FACT OF VIOLATION

Inspector Greiner's testimony that float coal dust was observed over an extended section of the belt, with some concentrations, has not been refuted. The existence of a pre-shift report dated March 6th indicating spillage along the belt supports that testimony. Spillage, requiring at least "spot" cleaning, occurred even though a belt shoveler had been assigned regularly on every shift to this section of the belt.

Mesa has established by a preponderance of the evidence that float coal dust was permitted to accumulate along the belt in violation of 30 CFR § 75.400.

UNWARRANTABLE FAILURE

The second requirement of a valid 104(c) order is that the violation be caused by the "unwarrantable failure" of the operator to comply with the regulations. Congress pointedly omitted any binding definition of "unwarrantable failure" in its list of statutory definitions embodied in

section 2 of the Act, thus leaving the resolution of its meaning to case-by-case adjudication by the Secretary, with only the scantiest guidance in the legislative history. Zeigler Coal Company, 4 IBMA 139, 156.

> * * * [T]he legislative history unmistakably suggests that a given 104(c) violation possesses the requisite degrees of fault where, on the basis of the evidentiary record, a reasonable man would conclude that the operator intentionally or knowingly failed to comply or demonstrated a reckless disregard for the health or safety of the miners. [3/] Eastern Associated Coal Corp., 3 IBMA 331, 356.

The Board has on other occasions dealt with the definition of unwarrantable failure and has defined it as "intentional, knowing or reckless deviations from the mandatory standard of care." Zeigler Coal Company, 4 IBMA 139, 154.

The violation in this case was the result of the Applicant's unwarrantabl failure to comply with the regulations. A pre-shift examiner's report had shown spillage at certain spots on the belt. Admittedly, there were no water sprays installed at the belt head to alleviate the accumulation of float coal dust. It is clear that the violation occurred as the resul of a lack of due diligence on the part of the Applicant.

INTERVENING CLEAN INSPECTION

Applicant contends that a series of spot inspections covering the entire mine intervened between issuance of the underlying section 104(c)(1) Withdrawal Order and issuance of the 104(c)(2) withdrawal order under review in this proceeding and that this series of spot inspections constitutes an "inspection of such mine which discloses no similar violations" thereby removing Applicant from liability for withdrawal

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3/ Legislative history is a relevant authority only where the statute is patently ambiguous. In pertinent part, the history bearing on the meaning of unwarrantable failure appears at page 1030 of House Comm. on Ed. and Labor, Legislative History Federal Coal Mine Health and Safety Act, Comm. Print, 91st Congress, 2d Session and reads as follows: * * * The managers note that an unwarrantable failure of the operator to comply means the failure of an operator to abate a violation he knew or should have known existed, or the failure to abate a violation because of a lack of due diligence, or because of indifference or lack of reasonable care, on the operator' part. (Emphasis added.)

rders under section 104(c). Applicant also contends that a single lean spot inspection can relieve the operator of liability under 104(c)(2). his latter contention is without merit.

> If the legislators had intended to lift liability upon a clean spot inspection subsequent to the issuance of a (c)(2) closure order, we think that they would have used the words "any inspection" rather than "an inspection" in the phrase quoted above. The language actually employed appears to us to direct a thorough examination of the conditions and practices throughout a mine. Indeed the intensive and quite possibly prolonged scrutiny seems entirely called for in the case of an operator which may have repeatedly demonstrated its indifference to the health or safety of miners and where its record suggests that other equally grave infractions resulting from unwarrantable failures to comply may exist elsewhere in the mine.

astern Associated Coal Corp., 3 IBMA 331, 358, 81 I.D. 567, _____ SHD par. _____ (1974), aff'd on reconsideration, In the Matter of astern Associated Coal Corp., 3 IBMA 383, _____ I.D. _____, _____ SHD par. _____ (1974).

ESA concedes that a series of spot inspections may constitute a complete nspection. This position is in accord with the Board's decision upon econsideration of Eastern:

> Under our interpretation, as set forth in the opinion of September 20, 1974, several completed partial or completed spot inspections of a mine may be required to constitute a "complete inspection" of a mine in order to lift the withdrawal order liability of an operator from the provisions of section 104(c)(2). In the Matter of Eastern Associated Coal Corp., 3 IBMA 383, 386.

ESA denied, however, that the series of clean spot inspections from ovember 13, 1973, to December 19, 1973, constituted the required com- lete inspection because they were not all health and/or safety inspec- ions.

During this period, MESA conducted 36 spot inspections of this mine, as follows:

Spot Ventilation	13 inspections
103(i)	13 inspections
Spot Safety	4 inspections
Spot Health & Safety	4 inspections
Spot Health	2 inspections

MESA concluded that this "SERIES OF SPOT INSPECTIONS NOVEMBER 13 to DECEMBER 19, 1973, COVERED THE ENTIRE MINE" (Emphasis added) (Applicant's Exhibit #1). MESA argues, however, that only the four annual inspections of the entire mine required by section 103(a) of the Act (30 U.S.C. § 813(a)) qualify as complete inspections and that the initial procedure of issuance of section 104(c) notices can be reinstated only if no 104(c) orders are issued during one of these four inspections. This stance is consistent with the instructions given by MESA to its inspectors with respect to the issuance of 104(c)(2) orders.

> For the purposes of "wiping the slate clean" after the issuance of a 104(c)(1) or 104(c)(2) order and reinstating the initial procedure of issuance of 104(c)(1) Notices before issuance of an Order under 104(c), a complete inspection of the entire mine * * * must be made which reveals no unwarrantable failure violation (a "clean" inspection). United States Department of the Interior, MESA, Health and Safety Manual for Orders, Notices and Report Writing, § 1.2A (1973).

A complete inspection is defined by MESA as "the examination of the entir mine by authorized personnel to determine compliance with regulations." United States Department of the Interior, MESA, Coal Mine Inspection Manual for Underground Mines, § 1.5 (1973). The Manual then goes on to specify the procedures for conducting and recording "complete" health or safety spot inspections and hazardous spot inspections.

1. Schedule each spot inspection toward the end result of having inspected each section within a mine. Report such inspections in the present manner of reporting such inspections.

2. After each section within a mine has been inspected through a series of such spot inspections, an additional spot inspection shall be made of the other areas of the mine.

Report such an inspection in the same manner that spot inspections are presently being reported; however, in the written report of this inspection, * * * record the statement that this inspection completes a series of spot inspections which covered the entire mine.

3. Depending on circumstances, such a series of spot inspections can be either safety, health, or combination health and safety spot inspections. Such a series of hazardous spot inspections must be safety type spot inspections.

4. For reporting purposes when the last of such a series of spot inspections is completed, report a "complete" health or safety or a "complete" combination health and safety inspection as the case may be.

The series of spot inspections from November 13 to December 19, 1973, was not a "complete inspection" in the sense that it was not one of the four required annual inspections and was not composed solely of health and safety spots. It was, however, an inspection of the entire mine and designated as such by MESA. The record is clear that the entire underground mine was inspected by this series of spot health, safety, health and safety, ventilation and 103 inspections and that no section 104(c)(2) orders were issued during this series. The record also establishes that every inspector carries "all required equipment" underground (VINC 73-113 Tr. 116); that an operator is in no way limited as to the kinds or numbers of closure orders or notices of violation he may issue during his inspection, regardless of the type of inspection he may be conducting (VINC 73-113, Tr. 101); that the designation of an inspection as "spot health" or "spot ventilation" merely indicates what the inspector is emphasizing (VINC 73-113, Tr. 118); that, in fact, an inspector "is required to" pay attention to and cite any violation he sees (VINC 73-113 Tr. 101, 116); and, finally, that the operator could not tell any differe between the different kinds of inspections (VINC 73-113, Tr. 250, 291, 29 298).

Neither the Act as written nor as interpreted by the Board requires that "an inspection of the mine which discloses no similar violations" under section 104(c)(2) be comprised entirely of health and/or safety spots. MESA has introduced no evidence to explain or refute its own designation of this series of spots as constituting an inspection of the entire mine. The inspections were conducted over a period of time longer than that required to complete some of the four annual inspections (Gov't. Exh. B). Old Ben Mine No. 24 was subjected to the "intensive and quite possibly prolonged scrutiny" called for in Zeigler (3 IBMA 331, 358) during this series of spot inspections. No "other equally grave infractions resultin from unwarrantable failures to comply" (Id.) were found in the mine durin this period. I therefore find that a clean inspection of the entire mine occurred prior to issuance of Order No. 1 HG, wiping the Applicant's slate clean with respect to liability for 104(c)(2) orders and that Order No. 1 HG was invalidly issued.

CONCLUSIONS OF LAW

1. These proceedings are governed by the provisions of the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. § 801 et seq. (1970)) and the regulations promulgated in implementation thereof.

2. At all times relevant to this proceeding, Applicant, Old Ben Coal Company, was subject to the provisions of the Act.

3. Section 30 CFR 75.400 is valid.

4. A violation of 30 CFR 75.400 was established.

5. The violation was the result of the operator's unwarrantable failure to comply with the Act.

6. A complete inspection of the mine disclosing no similar violations intervened between the issuance of the original 104(c)(1) notice and order and the issuance of the withdrawal order at issue in this proceeding.

7. Based on Conclusion No. 6, Order of Withdrawal 1 HG, dated March 6, 1974, was improperly issued and should be vacated.

ORDER

Based upon the record in these proceedings and the Conclusions of Law, it is ORDERED:

1. That the Application for Review be GRANTED, and

2. That Order of Withdrawal No. 1 HG, issued March 6, 1974, to Old Ben Company be VACATED.

R. M. Steiner
Administrative Law Judge

Distribution:
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1 MA

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. SE 80-124-M A.O. No. 09-00265-05004
v.	:	Junction City Mine
BROWN BROTHERS SAND CO., Respondent	:	

DECISION

Appearances: Ken S. Welsch, Esq., U.S. Department of Labor, Atlanta, Georgia, for petitioner;
Carl Brown, Howard, Georgia, pro se, for the respondent

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil pena filed by the petitioner against the respondent pursuant to section 11 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with one alleged violation issued pursuant to the Act and implementing regulation. Respondent filed an answer in the proceedings and a hearing was held on April 13, 1981, in Columbus Georgia, and the parties appeared and participated therein. The part waived the filing of post-hearing arguments, were afforded the opport to make arguments on the record and those have been considered by me in the course of this decision. With the agreement of the parties, I rendered a bench decision in this matter, and it is reduced in writin herein as required by the Commission Rule 65, 29 CFR 2700.65.

Issues

The principal issues presented in this proceeding are (1) whethe respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalt filed in this proceeding, and, if so, (2) the appropriate civil penal that should be assessed against the respondent for the alleged violat based upon the criteria set forth in section 110(i) of the Act. Addi issues raised by the parties are identified and disposed of in the co of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 29 CFR 2700.1 et seq.

Stipulations

The parties stipulated that the respondent is engaged in a small sand dredging operation, and the company is a family owned business employing approximately seven individuals, and that the respondent is subject to the Act and to MSHA's enforcement jurisdiction. In addition, the parties agreed that the proposed civil penalty will not adversely affect respondent's ability to continue in business, and that the respondent's history of prior violations is reflected in exhibit P-1, an MSHA computer print-out listing seven prior paid citations.

Discussion

The respondent has been charged with a violation of the reporting requirements of 30 CFR 50.30(a), and the citation issued by the inspector No. 099168, at 11:00 a.m., on June 26, 1980, states as follows:

> Operator failed to file MSHA form 7000-2 (Quarterly Manhour Report) for 1st qt. of 1980 (Jan.-Feb.-Mar.). This report should have been filed by 4-15-1980.

The inspector fixed the abatement time as 2:00 p.m., June 26, 1980, and the termination notice reflects that the report was completed and mailed on that date at 1:45 p.m.

Testimony and Evidence Adduced by the Petitioner

MSHA Inspector Allene T. Jones confirmed that she issued the citation in question during the course of an inspection conducted at the respondent's operation. She stated that she spoke with Mr. Steven Brown, one of the

7000-2, since she had information that the form had never been submitted or received for the first quarter of 1980. Either Mr. Brown or his secretary filled out a new form while she was at the mine, and Inspector Jones took it with her and mailed it for the respondent (Tr. 28-32).

Inspector Jones testified that the law requires the form in question to be submitted, and that the information which is filed is used for the compilation of violation and accident frequency rates. She also identified a copy of the form in question (exhibit P-3), and stated that Steven Brown told her that the form was not submitted because his father did not want to file any forms and usually "tossed them in the trash can" (Tr. 32-35). On cross-examination, Inspector Jones explained the various computer codes stated on the fact of the form, and explained the rationale for the requirement that the form be filed with MSHA (Tr. 35-39).

MSHA Supervisory Inspector Reino Matson testified that prior to the issuance of the citation in question, namely, in December of 1978, he discussed the requirements of MSHA Form 7000-2, with both Steve and Carl Brown at their office. Respondent had failed at that time to file the quarterly report, and during the discussion Mr. Carl Brown stated that any correspondence from MSHA usually goes in "file 13", and he pointed at the waste paper basket. Mr. Matson stated further that he explained the results of the failure to file the form, advised Mr. Brown that he would have to issue a citation if he did not file the form, and then went to his car and obtained some blank forms for him. Mr. Brown's son Steven advised Mr. Matson at that time that he would file the form, and it was in fact filed, but Mr. Matson issued no citati at that time (Tr. 40-47). Mr. Matson also explained the rationale for the form and the information that is required to be submitted, and indicated that the information is also used for the scheduling of inspec at those mines which show high accident and violation rates (Tr. 57-59).

Respondent's Testimony and Evidence

Respondent was given a full opportunity to present any testimony or information it desired in defense of the citation. Both Mr. Carl Brown and Mr. Steven Brown were afforded an opportunity to state their positions, and with my permission, were afforded an opportunity to record the entire hearing with their own tape recording device. Mr. Carl Brown candidly admitted that he threw the form away (Tr. 37). He also alluded to a recent survey he received from the U.S. Department of Interior solicitor certain information concerning his mining operation (Tr. 40), and throughout the hearing expressed his displeasur with forms in general.

In defense of the citation in question, both Mr. Carl Brown and Mr. Steven Brown stated that they felt coerced by the cautionary statement which appears at the top of the form (exhibit P-3),

which states the criminal sanctions of fines of $10,000 and imprisonment for five years for making false or fraudulent statements on the form. And, while the statement distinguishes between civil sanctions under the Act, it is altogether possible that they did not distinguish the civil sanctions from the criminal sanctions. Further, it seems clear to me that respondent still believes that the information required to be submitted has no rational relationship to the safety of its employees (Tr. 42, 53, 54, 59, 62, 64).

Findings and Conclusions

Fact of violation

Petitioner's evidence establishes that the respondent failed to timely file the required report form in question and the respondent does not dispute this fact. As a matter of fact, Mr. Carl Brown admitted that he threw the form away "in the round file" as so much "junk mail". Aside from his obvious displeasure of Government regulations, his defense to the citation was basically an assertion on his part that the information required by the form has no rational relationship to the safety of his work force. One additional defense made during the hearin by Mr. Brown's son Steven, was that respondent simply does not take kindly to being "coerced or forced" to file any forms by any Governmental authority. Both defenses are rejected. I conclude that the petitioner has established a legitimate need for the information in order to carry out part of its statutory duty pursuant to section 103 of the Act. As for the asserted coercion, while there may have been some initial confusion on the part of the respondent with respect to the ramifications of failing to file the form, particularly with respect to the criminal penalty provisions for making false statements as stated on the face of the form, as well as the cautionary statement regarding civil penalties which could be levied for failing to file the information, I believe that any ambiguity or misunderstanding was cleared up at the time the form was submitted to terminate the citation. Under the circumstances, the citation is AFFIRMED.

Size of Business and Effect of the Penalty on Respondent's Ability to Continue in Business

The parties stipulated that the respondent is a small family owned sand dredging mine operator, and I find that the penalty assessed in this case will not adversely affect respondent's ability to continue in business.

Gravity

I conclude and find that the citation issued in this case is non-serious and the petitioner as well as the inspector's who testified in this case conceded as much.

Negligence

Although I do not condone Mr. Carl Brown's act of throwing the form away as so much "junk mail", I can understand his initial frustrati

being required to execute a form which calls for the submission
f a variety of information, and which contains notices regarding
erious civil and criminal penalties for failure to file or for filing
alse information. Further, I have considered the fact that Mr. Brown
ay not have clearly understood the ramifications of his symbolic act
f defiance, and considering the volume and substance of all of
he letters or protest from Mr. Brown which are a matter of record, it
s obvious that Mr. Brown is not too enchanted with the filing require-
ents of the cited regulation. Nonetheless, since I have concluded that
etitioner has shown a legitimate interest in compiling the type of informa
ion required by the form as part of its enforcement of mine health and
afety, and since it is a regulatory requirement based on the provisions
f the Act, compliance is expected of all mine operators, including this
espondent. Hopefully, such compliance will be voluntary, and that in
he future respondent will comply with the law.

Petitioner's testimony reflects that Mr. Brown was put on notice
s early as 1978, that the form in question had to be submitted. As a
atter of fact, the inspector obtained the form for him and helped him
ill it out. Therefore, I believe that respondent had prior notice of
he requirements of the regulation in question, and while his subsequent
ailure to file borders on gross negligence, I have considered the fact
hat respondent may have been confused as to what was required and find
hat the citation in question here resulted from respondent's failure to
xercise a reasonable care amounting to ordinary negligence.

ood Faith Compliance

The instant citation was abated with the patient assistance of
he inspector, and after some prodding by MSHA. Accordingly, I find
hat respondent exhibited no extraordinary efforts at compliance.
urther, petitioner presented evidence and testimony that while the
itation in question was abated by the filing of the form by Mr. Steven
rown, two subsequent forms were returned to MSHA by the respondent and
ere not completed (Exhibits P-4, P-5). No additional citations
ere issued for these acts of noncompliance, and Inspector Matson
xplained that it is his policy not to issue citations in these
ircumstances while a contest or litigation is pending. Since section
04(a) of the Act mandates that citations be issued with reasonable
romptness, MSHA may wish to consider the wisdom of such a policy.
y observation in this regard is not intended as criticism of the
nspector since I believe he acted with remarkable restraint and good
udgment considering the fact that he was dealing with a somewhat
ecalcitrant operator. Just as Mr. Brown has exhibited his frustration,
o too have the inspectors who have to deal with him.

istory of Prior Violations

Respondent's prior history of violations reflects that for the
eriod August 14, 1978, through August 13, 1980, respondent has paid
ivil penalties amounting to $324 for seven violations of mandatory

safety standards. Based on this prior record, I cannot conclude that this history warrants any increase in the penalty assessed in this case for the citation which I have affirmed.

Penalty Assessment and Order

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty in the amount of ten ($10) dollars is reasonable and appropriate for Citation No. 099168, June 26, 1980, 30 CFR 50.30(a), and respondent IS ORDERED to pay the penalty within thirty (30) days of the date of this decision.

Postcript

By letter dated April 22, 1981, Mr. Carl Brown stated that he wished to appeal my decision affirming the citation and imposing a ten dollar civil penalty for the violation. Mr. Brown states that his appeal is based on "public sympathy". While the letter was filed after my bench decision was rendered, it was filed before my decision was reduced to writing as required by the Commission's rules. Under the circumstances, any appeal rights which respondent may have begin to run as of the date of this written decision, and I am enclosing a copy of the pertinent Commission procedural rules for filing such appeals.

George A. Koutras
Administrative Law Judge

Enclosure

Distribution:

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Carl Brown, Brown Brothers Sand Co., Box 32, Howard, GA 31039 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

4 MAY 1981

CRETARY OF LABOR, MINE SAFETY AND ALTH ADMINISTRATION (MSHA), on aalf of JAMES FRANKLIN COULTER, Complainant, v. TTER CORPORATION, Respondent.	COMPLAINT OF DISCHARGE, DISCRIMINATION OR INTERFERENCE DOCKET NO. WEST 81-11-DM MINE: Cotter Mill

DECISION AND ORDER

On April 23, 1981, the parties to this proceeding filed with the amission a Stipulation of Settlement, Consent, and Motion seeking an reed disposition of the case.

Under the terms of the stipulation, the parties agree that respondent ll compensate James Franklin Coulter in the amount of $1,000.00 for loss back wages and other expenses resulting from his discharge; that spondent shall expunge the employment record of James Franklin Coulter of adverse references relating to his discharge; and that James Franklin alter shall accept the above stipulations as full settlement of the claim ving rise to this case.

By joint motion, the parties therefore seek an order providing that thin 40 days respondent tender the agreed upon sum to complainant; that spondent expunge from complainant's employment record any adverse ferences relating to his discharge; that respondent transmit to mplainant a copy of his employment record reflecting the deletion of any verse references relating to his discharge; and that the confidential les of respondent's attorney may be introduced as evidence in any bsequent proceeding brought by complainant against respondent relating to discharge.

Given complainant's consent to the terms of the settlement and finding at such settlement will effectuate the purposes of the Federal Mine fety and Health Act of 1977, 30 U.S.C. § 801 et seq., it is

ORDERED: that the settlement agreed to by the parties is hereby PROVED, that the joint motion is hereby GRANTED in full and, that this se is hereby DISMISSED WITH PREJUDICE.

John A. Carlson
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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6 MAY 19

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. SE 81-10-M A.O. No. 09-00264-05005
v.	:	Rollo Pit
CRAWFORD COUNTY MINING, INC., Respondent	:	

DECISION

Appearances: Ken S. Welsch, Attorney, U.S. Department of Labor, Atlanta, Georgia, for the petitioner;
Curt B. Jamison, Atlanta, Georgia, for the respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with one alleged violation issued pursuant to the Act and the implementing mandatory safety and health standards. Respondent filed a timely answer in the proceeding and a hearing regarding the proposal was held on April 14, 1981, in Macon, Georgia, and the parties appeared and participated therein. Although given an opportunity to file post-hearing briefs and/or proposed findings and conclusions, the parties declined to do so.

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulation as alleged in the proposal for assessment of civil penalty filed in this proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria:

(1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 29 CFR 2700.1 et seq.

Stipulations

The parties stipulated that respondent is subject to the Act, that it engages in mining activities, the products of which affect inter-state commerce, that it employs approximately 24 individuals at the subject mine, and that the mine operates one-to-two shifts, 5-1/2 days a week. Respondent's history of prior violations is reflected in exhibit P-1, an MSHA computer printout reflecting 18 paid citations for a 24-month period November 20, 1978 through November 19, 1980 (Tr. 6-10).

Discussion

Citation No. 099125, 6/12/80, alleges a violation of 30 CFR 56.11-27, and the condition or practice described by the inspector is as follows (exhibit P-2).

> The allon cyclone was not provided with a work platform or handrails. Men had to stand on single wooden boards, when work was performed. Persons could fall about 50 feet to to the ground.

The inspector established the initial abatement time as July 21, 1980, but extended this date to September 1, 1980, for the following reason (exhibit P-2):

> The company is presently deciding whether to build a platform on the allon cyclone or to build a new installation. Safety belts and lines are to be worn at all times on the cyclone until this construction is completed.

The citation was terminated on September 10, 1980, when another MSHA inspector found that compliance had been met, and the justificatio

for the termination is described as follows (exhibit P-2): "A walkway with handrails were installed around the top of the Allon Cyclone area".

MSHA Inspector Steve Manis confirmed that he conducted an inspection of respondent's mine on June 12, 1980, and that he was accompanied on his inspection rounds by Larry Jamison, the mine manager Inspector Manis also confirmed that he issued the citation in question after determining that the Allon cyclone did not have work platforms installed where employees were required to perform work. Mr. Manis identified three photographs taken by a fellow inspector at the cyclone location in question, and he identified three areas or "levels" of the structure which concerned him (exhibit P-3). He estimated the height from the top of each level to the ground level to be 50 feet from the extreme top level, 40 feet from the second level, and 30 to 35 feet from the third level (Tr. 12-21).

Inspector Manis testified that the purpose of the cyclone is to separate the fine and coarse particles being pumped into it by water pressure. He determined that employees were required to perform work on the cyclone structure after being told that this was the case by an employee, and he also observed the presence of a fixed, permanent metal ladder attached to the structure, as well as several wooden 2 x 6 boards which were in place at the three levels. He also observed that the rungs of the metal ladder were worn and shiny, which indicated to him that the ladder was used rather frequently. All of these factors led him to conclude that employees were required to climb onto to the cyclone structure to perform work on a regular basis (Tr. 21-22).

Mr. Manis testified that he was told that employees had ocassion to climb the cyclone ladder once or twice a week to go to the top of the cyclone. He was also told that if there is a lot of work to perform on the cyclone someone may have to stay at the top all day. In such situations, he would not accept the use of a safety belt as compliance, but would require the use of a work platform (Tr. 62-63). Although he observed no one on the ladder or the cyclone on the day of his inspection, he was told that the work performed included the changing of the position of the cyclone apex as well as the changing of piping (Tr. 64). He also stated that he was told that the purpose of the boards was to facilitate someone standing on them while performing work (Tr. 64

On cross-examination, Inspector Manis confirmed that he issued the citation because he believed the entire cyclone location where boards were installed for the purpose of facilitating access to the areas described were not approved working platforms (Tr. 23). In further explanation as to why he issued the citation in question, even though he had issued another citation at the same time for failure by the respondent to provide safety belts on the cyclone, Mr. Manis stated that he could have issued three separate work platform citations for each of the levels which were not provided with platforms. He also explained

that he did not expect the respondent to construct a platform at every area on the cyclone where an employee had to reach for the purpose of performing work. As an example, he cited the cyclone pipeline where a safety belt would suffice because a platform could not be constructed around the pipeline. However, during the construction of the platform and while it was being installed, a safety belt would have to be worn if an employee had to climb the structure to perform some work (Tr. 36-37).

Respondent's Testimony and Evidence

Respondent presented no testimony from any witnesses with respect to the citation. However, respondent's representative Curt Jamison was given a full opportunity to cross-examine the inspector, as well as make an argument in defense of the citation. With respect to the middle level cyclone location, Mr. Jamison asserted that it was used only to store a wrench and other tools used by employees while they were standi on the lower level boards. The mid-level board was only used to facili the placing of a wrench, and inspector Manis confirmed that he observed such a wrench there and did not dispute Mr. Jamison's assertion that no employee stood on the mid-level board to perform any maintenance or work. Mr. Jamison conceded that an employee is required to stand on the lower level board "every couple of weeks" to unbolt and replace a discharge portion of the cyclone with a wrench (Tr. 65-67). In addition, Mr. Jamison conceded that someone may have ocassion to go to the lower level of the cyclone "a couple of times a week" (Tr. 67).

With regard to the top portion of the cyclone, Mr. Jamison asserte that the only reason one would have to go there would be to repair a leak in the pipe. In his view, this was not a regular chore, that there are months at a time when no one goes to the top level, and that is not a daily occurrence (Tr. 67). Mr. Jamison also asserted that abatement was achieved by installing a work platform at the top and low levels of the cyclone (Tr. 69). It was his view that any danger which may have existed, existed at the top portion of the cyclone and not the lower portion (Tr. 69).

Findings and Conclusions

Fact of Violation

In this case, respondent is charged with one violation of the provisions of mandatory safety standard 30 CFR 56.11-27, which provides as follows:

> Scaffolds and working platforms shall be of substantial construction and provided with handrails and maintained in good condition. Floor boards shall be laid properly and the scaffolds and working platforms shall not be overloaded . Working platforms shall be provided with toeguards when necessary.

During the course of the hearing, respondent verified the fact that Inspector Manis issued a second citation (No. 99126) on June 12, 1980, at precisely the same time as the one in issue and that it was issued for failure by the respondent to have a safety belt or line on the cyclone for use of employees who had to climb onto it to perform work, as required by section 56.15-51. Respondent produced a copy of Mr. Manis' narrative statement executed at the time he issued the safety belt citation which reflects that respondent may have been aware of the requirements for safety belts through a prior inspection conducted at the mine site (Tr. 27-29).

In its answer filed on February 17, 1981, to the petitioner's proposal for assessment of civil penalty, respondent asserts that the citation in question is essentially a duplication of the safety belt citation issued by Inspector Manis. Respondent paid the penalty assessment for that citation, and since the same condition or practice is described in both citations, respondent believes it is being unduly penalized for the same violation. Respondent also maintains that the fact the supposedly dangerous conditions were abated renders any other potential citation regarding the same area moot.

Respondent's argument is that the previous citation issued by Mr. Manis for the failure to provide a safety belt on the cyclone was abated by the respondent when it provided the required safety belt or line. Since the inspector was concerned about the hazardous location at the top level of the cyclone, respondent maintains that by providing a safety belt, that somehow eliminated the hazardous condition, and that it is patently unfair to cite the respondent a second time for the identical hazardous condition. Aside from the fact that the respondent does not believe that the cited conditions were hazardous or dangerous, respondent considers the condition described by the inspector as one single assertedly hazardous condition, and in effect argues that to cite the respondent for two separate violations places him in jeopardy twice for the identical single condition.

Respondent asserted that when he discussed the matter with an MSHA conference officer, he was told that the reason two citations were issued was that the inspector was concerned with the lack of safety belts at the very top of the cyclone, and the lack of substantial work platforms at the lower levels of the cyclone. In short, respondent was advised that two citations were issued because of the fact that two dangerous conditions were presented (Tr. 27-35).

Respondent maintains that it was led to believe that safety belts were required at the top location of the cyclone, and its position is that if a safety belt suffices to protect someone at the top, it surely should be acceptable at the two lower levels. Since Inspector Manis was concerned about the entire cyclone structure when he issued citation 099125, the use of safety belts at all three levels which concerned him should suffice as compliance. In short, respondent argues that the

use of safety belts precludes the need for the installation of work platforms. The theory of respondent's case is stated as follows at pg. 41 of the hearing transcript:

> MR. JAMISON: I do. Mr. Manis has testified, however, that this citation 099125 is the whole cyclone area, top to bottom -- top, middle, and bottom.
>
> JUDGE KOUTRAS: That's right.
>
> MR. JAMISON: So if safety belts suffice for safety at the top level, surely they suffice for safety at the middle or bottom level.
>
> JUDGE KOUTRAS: Are you suggesting if you use a safety belt, you don't need platforms?
>
> MR. JAMISON: Yes.
>
> JUDGE KOUTRAS: What you're saying, in other words, if you have a safety belt and there's no requirement that you have scaffolds and working platforms, et cetera, et cetera?
>
> MR. JAMISON: Based on the reasoning behind there being two citations to start with.

MSHA's interpretation of the requirements of section 56.11-27, was succintly stated by its counsel at pages 42, and 44-45 of the transcript. MSHA's position is that work platforms of the type required by the standard were required to be installed at those locations on the cyclone where the respondent had placed the 2 x 6 boards. Once the installation of work platforms is complete, respondent would be expected to use the platforms while performing regular or frequent work or maintenance on the cyclone at those locations. However, in those areas on the cyclone where sporadic or infrequent work or maintenance is performed, respondent may use safety belts or lines in lieu of constructing platforms. In addition, during the time that a work platform is being constructed, respondent would be expected to use safety belts or lines until such time as the platform construction is completed.

I take note of the fact that the written description of the condition or practice cited by the inspector on the face of the citation, when read together with the abatement or termination notice issued by another inspector, conveys the clear impression that the inspector was concerned with only one hazardous location on the cyclone structure, namely the top level. During the course of the hearing, respondent asserted that it was unaware of the fact that inspector Manis was concerned with three locations on the cyclone, and respondent indicated further that during several discussions with MSHA's office of assessments and the solicitor's office, he was led to believe that the use of safety belts at the top location of the cyclone was sufficient for compliance.

MSHA's counsel candidly conceded that he had discussed the matter with the respondent in advance of the hearing and that he emphasized the fact that the frequency and nature of the work required at any cyclone location would dictate whether a platform or safety belt was required for compliance (Tr. 47). Counsel pointed out that in this case, it was his understanding that respondent installed platforms at all three cyclone levels and has also provided safety belts for the other areas where employees were required to work (Tr. 48). Respondent conceded that he installed the platforms because there are times when there are more employees present then there are belts (Tr. 51).

While there may have been some confusion as to precisely what was required to achieve compliance in this case, I believe that the confusion came after the time the inspector issued the citation for the lack of platforms and safety belts. My analysis of the testimony of Inspector Manis in support of the citation in question leads me to conclude that he was concerned with two distinct hazards when he issued the two citations. His first concern was that the respondent was using 2 x 6 wooden planks as a work platform, and since the planks were not securely in place and lacked handrails, he obviously believed they did not meet the requirements of section 56.11-27, and presented a hazard to anyone standing on them while performing work at the cyclone locations which he testified about. An additional concern was the fact that he believed employees had at some time been at the top of the cyclone without a belt because he saw no evidence that belts were being used or located on the cyclone at the time of his inspection. Respondent stated that he did not discuss the situation with Inspector Manis at the time the citations issued, and that all of the subsequent conversations and discussions concerning the two citations came at later times during the informal conferences with MSHA officials (Tr. 51).

Section 110(a) provides that "each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense". Accordingly, it seems clear to me that any condition or practice found by an inspector during the course of an inspection may constitute a violation of one or more mandatory standards if the conditions cited warrant such a conclusion. On the facts presented in this case it seems clear to me that Inspector Manis intended to cite the respondent for a violation of section 56.11-27 on the basis of his conclusion that the respondent failed to install the required working platforms in question. The fact that he also, at the same time, cited the respondent for failing to provide safety belts where there was a danger of falling, does not render the platform citation illegal or improper. Respondent had an opportunity to challenge the safety belt citation but decided to pay the assessment for that citation. Any confusion which may have resulted with respect to the application of sections 56.11-27 and 56.15-5, occurred after the citations issued and during the conferences held on the proposed assessments.

As I observed during the hearing, the conditions cited by Inspector Manis on the face of the citation which he issued do not include the fact that he was concerned with three distinct unprotected areas of the cyclone in question. Further, the abatement and termination notice reflects that a walkway with handrails was installed at the top area of the cyclone. After consideration of the testimony and evidence presented by the parties, I find that the middle level which concerned the inspector was not used as a work platform. Respondent's evidence that it was used only to facilitate the storage of a wrench and other tools and MSHA has not rebutted this fact. Under the circumstances, if that were the only location cited or testified to by the inspector I would have to vacate the citation. As for the lower and top levels, the evidence establishes that work was performed from those locations and while the gravity of the citation insofar as the lower level is concerned may not have been as great as that which prevailed at the very top of the cyclone, the fact is that petitioner's evidence establishes that both levels were unprotected. Accordingly, I conclude and find that petitioner has established a violation of section 56.11-27, and the citation is AFFIRMED.

Size of Business and Effect of the Penalty on Respondent's Ability to Continue in Business.

I conclude and find that the respondent is a small-to-medium sized operator and absent any evidence to the contrary, which has not been forthcoming, I cannot conclude that the civil penalty assessed by me for the citation in question will adversely affect respondent's ability to continue in business.

History of Prior Violations

Exhibit P-1, reflects that respondent has paid civil penalty assessments for 18 prior citations issued during the period November 20, 1978, through November 19, 1980, and there are no repeat violations of section 56.11-27. Considering the size of respondent's mining operation, I cannot conclude that this history of prior citations warrants any increase in the penalty assessed by me for the citation which I have affirmed.

Good Faith Compliance

The evidence adduced in this case establishes that the respondent achieved compliance by constructing protective working platforms on the cyclone in question. Accordingly, I find that respondent exercised normal good faith compliance in abating the conditions cited.

Negligence

Petitioner established that the respondent has another similar cyclone in operation on its property and introduced a photograph of that cyclone, which clearly shows that a permanent work platform is

asserted that this cyclone was constructed some 20 years ago, and that since it is located in the middle and above four large coned-shaped bins, it presents a hazard of someone falling between the bins straight down to a concrete walkway. This is the reason why a platform was installed (Tr. 54).

Respondent recognized the hazardous location of the "old" cyclone and that is the reason it constructed a permanent type working platform at that location. Its failure to provide similar protection for the cyclone cited in this case was based on its conclusion that it was not hazardous or dangerous. While this conclusion on the respondent's part may be true for the lowest or third level of the cyclone, I believe that the respondent should have been aware of the fact that the very top location of the cyclone which was accessible by the fixed ladder presente a hazard when employees were required to go there to perform maintenance or other work. Since the evidence establishes that this was not an infrequent occurrence I conclude that respondent failed to exercise reasonable care to prevent the condition cited by the inspector at that location. Accordingly, I find that the citation resulted from ordinary negligence by the respondent.

Gravity

Inspector Manis believed that anyone falling from any of the cyclone locations depicted in the photographic exhibits would likely strike the hard ground below and sustain serious injuries. Respondent disputed this fact and asserted that while one falling from the very top of the structure fifty feet below to hard ground would likely suffer fatal injuries, if he fell from the lower third level, he would likely suffer no injuries since he would fall into soft sand from a very short distance (Tr. 25).

Mr. Manis also testified that at the time he issued the citation in question, he observed no one on the structure, that there were no safety belts on the cyclone, and someone told him that none were on the premises, but he did not look for any (Tr. 58). Further, while he indicated that there were sand piles present on three sides of the unprotected cyclone, one side did not contain a sand pile below, and if an employee fell from the very top of the cyclone to the ground level below, some fifty feet, he would likely suffer serious injuries.

I conclude that the failure to install the work platform called for by the cited safety standard in question presented a serious situation which could have resulted in injuries in the event some one fell from the top of the structure. Of course, the severity of any injuries would depend on the particular facts and circumstances presented at any given time. I believe that an unprotected area of the cyclone where men were required to work presented a serious condition. Accordin I find that the citation cited was serious.

Penalty Assessment and Order

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty in the amount of $125 is reasonable and appropriate for Citation No. 099125, June 12, 1980, 30 CFR 56.11-27, and respondent is ORDERED to pay the penalty assessed within thirty (30) days of the date of this decision.

George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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6 MAY 1981

ITMANN COAL COMPANY, Applicant	:	Contest of Order
v.	:	Docket No. WEVA 80-226-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Itmann No. 3 Mine

DECISION

Appearances: Karl T. Skrypak, Esq., Counsel for Itmann Coal Company, Pittsburgh, Pennsylvania, for Applicant; Michael Bolden, Esq., Office of the Solicitor, U.S. Departm of Labor, Arlington, Virginia, for Respondent.

Before: Judge William Fauver

This proceeding was brought by Itmann Coal Company under section 105(of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. to review an order of withdrawal issued by a federal mine inspector, under tion 104(d)(2) of the Act. The case was heard at Charleston, West Virgini Both parties were represented by counsel, who have submitted their propose findings, conclusions, and briefs following receipt of the transcript.

Having considered the contentions of the parties and the record as a whole, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times, Applicant, Itmann Coal Company, operated coal mine known as the Itmann No. 3 Mine in Wyoming County, West Virginia, which produced coal for sales in or substantially affecting interstate commerce.

2. The Cabin Creek belt conveyor at Mine No. 3 is about 1,300 feet long. The mine liberates about 1,600,000 cubic feet of methane in a 24-ho period and there are extra exhaust fans at the tailpiece to draw methane o of the mine.

3. On January 21, 1980, federal inspector James F. Bowman chec cant's mine report books and noticed an entry on January 10 that the Creek crossbelt conveyor needed rock dusting. No subsequent entry s action had been taken to rock dust this area. A notation on the eve shift on January 11 read: "The CC5 cross needs cleaning between the and rock dusting." There was a similar entry for the evening shift January 17. On the day shifts of January 11 and January 17, 1980, C Martin apparently rock dusted the Cabin Creek 5 panel crossbelt. Ap Exhibit No. 5 is a statement by Charles Martin that he rock dusted t Creek 5 crossbelt on January 11. The corrective action for January not reported in the books until after the January 21 inspection.

4. Normally, a certified belt examiner inspects the mine to se surfaces are rock dusted and, if rock dusting is needed, he makes a in the report books. Regular employees are not authorized to change report books so that, even if the condition has been corrected, the examiner's notation in the report books remains unchanged until he m another inspection of the area and is satisfied that surfaces are ro

5. Inspector Bowman told Mr. Donnie Coleman, Applicant's safe visor, about the entries in the books and said that he wanted to see action had been taken. The inspector prepared to go underground wit rock-dust kit, which contained a 20-mesh screen to screen out oversi particles, a small collecting pan, and a brush.

6. Inspector Bowman and Mr. Coleman inspected the Cabin Creek beginning at the 6 panel 1 header 5 panel cross tailpiece. There we electricians working on a transformer when they arrived and the belt in operation.

7. They proceeded from the tailpiece along the left side of th about 100 feet and came to a series of cribs just beyond two rectifi boxes. The inspector observed float coal dust in this area, and too sample from the cribs. A skim sample is a sampling technique genera to test float coal dust. This method is not described in the MSHA i Underground Manual, but it is taught to inspectors in training cours sample is taken by brushing into the collection tray an area of floa dust about 6 inches wide and one-sixteenth to one-eighth inch deep. inspector placed the samples in a plastic bag and sealed the bag. H not first pass the sample through a screen.

8. They proceeded along the belt to an entry about 20 feet fro lock. The inspector took a skim sample of float coal dust from cind that had been removed from a stopping and stacked in the entry. The also took a skim sample from behind a crib about 10 feet from the ci blocks. He placed both samples in a bag and marked the bag.

9. Inspector Bowman and Mr. Coleman continued along the belt a between the last area he sampled (above) and an airlock, the inspect observed that the floor was extremely black and that the ribs and ro

ccumulations had been rock dusted. The heaviest concentrations of float
oal dust were near an airlock and a series of cribs; in this area he took
half-floor" sample by scraping a band about 1 inch deep and 6 inches wide
ver half the floor width. He could not take a sample on the other side o
he belt because the belt was in operation and there was no crossover and
o cut-off switch to stop the belt. The cut-off switches are at either en
f the belt. However, he could see accumulations on the other side. He
creened the half-floor sample, placed it in a bag and tagged it for
nalysis.

10. About 600 feet from the above sample, the inspector took his las
ample, which was another half-floor sample, inby the belt head near a
3,200-volt cable and underneath and on the right side of the belt, where
e found accumulations of loose coal, coal dust, and float coal dust. The
ccumulations ranged in depth from a quarter of an inch to about 18 inches

11. After the inspector took this sample, he told Mr. Coleman that he
as going to issue a section 104(d)(2) order of withdrawal. He later issu
he order that day. The order of withdrawal reads in part:

> Where rock dust was applied in Cabin Creek 5 cross belt conveyor entry it was not maintained to the required 65 per-centum. Samples were taken. The belt examiner's report book stated the conveyor entry needed rock dusted from the airlock to the tailpiece, a distance of approximately 600 feet and this violation had been repeatedly reported since 01-10-80, and no corrections were shown. The mine foreman and superintendent were countersigning the reports.

12. Inspector Bowman believed that the operator knew or should have
nown of the cited conditions and of the danger of accumulations of combust
le material. Sources of ignition in the Itmann No. 3 Mine included belt
dlers, high-voltage cables, belt-control cables, high-voltage transformers
pen-type belt-control boxes, and a high spot at the tail of the Cabin Cre
rossbelt that presented a methane problem.

13. It was the inspector's opinion that the accumulations occurred o
t least 3 days with maximum production from all sections feeding that bel

14. Frank Beard, vice president of Itmann Coal Company, was at the N
ine when Mr. Bailey told him that an order had been issued underground.
old Mr. Bailey not to let anyone perform any cleaning until he (Mr. Baile
ad a chance to inspect the cited area. Mr. Beard traveled the belt from
ead to the tailpiece, observing the ribs, roof, floor and underneath the
elt. When he reached the tailpiece, he turned around and walked back to
elt head, observing those areas again. In his opinion, the belt looked
roper with the exception of an area at the airlocks and some gray areas a
he tailpiece.

15. When Mr. Beard returned to the surface, he told his superv Mr. Warren Sharpenberg, that the area was in good shape and the orde not have been issued. They decided to take their own representative samples at 100-foot intervals from the belt head to the tailpiece. believed these samples would be more accurate and more representati the few taken by the inspector. Normally, Applicant took rock-dust every 200 feet.

16. On January 21, Mike Canada, a safety inspector for Itmann Company, took 17 band samples along the Cabin Creek 5 panel crossbel began taking samples about 21 feet inby the crossbelt drive and the sample was taken 30 feet outby the tailpiece. The belt was not runn that he could take samples on both sides of the belt.

17. There were no MSHA personnel or other company personnel pr while he took the samples. He was aware of the areas examined by In Bowman and he attempted to get samples from those areas. None of hi cut directly over the inspector's samples; however, some were fairly One sample taken at an airlock was within 1 foot of the inspector's

18. He followed MSHA's procedure for band sampling, making a t across the floor that was about 1 inch deep and 6 inches wide.

19. The areas sampled by Mr. Canada appeared dry and well rock with the following exceptions: Generally, on the offside of the bel is not normally walked, it was dark gray at spot locations (a grayis indicates that float coal dust is beginning to deposit on rock-duste surfaces); the No. 6 sample appeared slightly damp and Mr. Canada ob a 12-foot spillage on the left side of the belt; the No. 9 sample ap damp and black and he observed a film of float coal dust on the surf No. 10 sample appeared damp and float coal dust was measured at a or inch to a one-fourth-inch over heavily rock-dusted surfaces; the Nos through 17 samples appeared dry with visible float coal dust. Howev laboratory analyses showed that all of Mr. Canada's samples exceeded centum in incombustible content, which is the minimum set by the saf standard.

20. Government Exhibit No. 3 is a record of the laboratory res the samples taken previously by Inspector Bowman on January 21, and the following:

Sample No.	Area	Type	Percent Incombustible Content
1	100 feet outby tailpiece from crib	skim	58.3

2	40 feet inby airlock from cinder blocks	skim	50.0
3	10 feet inby airlock	half-floor	39.0
4	70 feet inby belt drive, offside	half-floor	19.0

21. The MSHA Underground Manual provides in relevant part:

Collection of dust samples to determine the incombustible content. The usual samples of mixed dust should be collected by the band or perimeter method of the entry or room, including a 1-inch depth of the material on the floor. Dust from the roof, ribs and floor should be combined into one "band" sample. If the amount collected is more than required, the sample should be mixed thoroughly, coned and quartered to cut the bulk to the desired amount. Occasionally, it may be necessary to take more than one strip, but in such case, the total width of the strip must be the same for the roof, each rib and floor. The plastic bag shall be filled for at leat half the length of of the bag. Separate samples of dust from either the roof, ribs or floor may be collected when deemed necessary. Where the coalbeds are so thick that it is impractical and unsafe to collect full perimeter samples, the inspector shall collect a floor sample and a sample from the ribs to the maximum height at which this can be done safely and practicably. The rib sample and the floor sample may be either combined or prepared separately. When rib samples are collected and reported separately, the incombustible content of the rib sample may be assumed to represent the incombustible content of the entire rib and roof surface at the sampling location.

DISCUSSION WITH FURTHER FINDINGS

Based on the order of withdrawal issued on January 21, 1980, the Secretary has charged Applicant with a violation of 30 C.F.R. § 75.403, which provides:

> Where rock dust is required to be appiled, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, but the incombustible content in the return aircourses shall be no less than 80 per centum. Where methane is present in any ventilating current, the per centum of incombustible

content of such combined dusts shall be increased 1.0 and 0.4 per centum for each 0.1 per centum of methane where 65 and 80 per centum, respectively, of incombustibles are required.

Applicant contends that the incombustible content of the Secretary's samples is inaccurate because the inspector did not follow the proper procedures for taking dust samples. Applicant argues that the two skim samples and the two half-floor samples represented less than 1 cubic foot in an entry of about 104,000 cubic feet and that Inspector Bowman's sampling techniques were arbitrary and capricious and not in accordance with the MSHA Underground Manual for inspectors. Applicant contends that its 17 band samples followed proper procedures and should be accepted over the government's samples.

The Secretary contends that Inspector Bowman's sampling techniques, although not stated expressly in the MSHA Underground Manual, "are used by the inspectors and are recognized in scientific literature." The Secretary argues that a charge of a violation of the cited standard depends initially on the inspector's visual observation, that the inspector observed many accumulations along the 1,300-foot belt, and that his observations and conclusions were later supported by laboratory analysis.

The usual method of collecting dust samples to measure incombustible content is the perimeter (or band-sample) method. The MSHA Underground Manual, which was published on March 9, 1978, considers the band sample the most accurate method of measuring incombustible content. However, the procedures outlined in the Manual are flexible and the half-floor and skim sample methods, although not contained in the manual, are recognized and approved procedures used by federal mine inspectors and are part of the inspectors' training course. In this case, there were reasonable grounds for the inspector's procedures: (1) a running conveyor and obstructions warranted the half-floor samples and (2) accumulations on the cribs and cinder blocks warranted the skim samples, since cribs and cinder blocks are not the floor, ribs or roof.

I find that the samples taken by Inspector Bowman are reliable, in accordance with accepted sampling procedures, and establish a violation of the rock-dusting standard. The accumulations observed by him, and confirmed by laboratory analysis, were visually evident and, by the exercise of reasonable care, should have been detected and corrected by the operator before the inspection. A finding of an unwarrantable failure to comply is therefor supported by the evidence. Also, the evidence of ignition sources and potential methane liberation in the areas of accumulation justify a finding that the violation could significantly and substantially contribute to the cause and effect of a mine safety hazard.

CONCLUSIONS OF LAW

1. The undersigned Judge has jurisdiction over the parties and the subject matter of the above proceeding.

2. The Secretary proved by a preponderance of the evidence that d samples taken in the Cabin Creek 5 crossbelt conveyor entry in Applican No. 3 Mine were in excess of 65 per centum and that Applicant therefore lated 30 C.F.R. § 75.403, as charged in Order of Withdrawal No. 657867. Several entries in the company's report books showed the need for clean and rock-dusting and, as of the January 21 inspection the books did not that the cited areas had been rock-dusted.

3. The Secretary proved by a preponderance of the evidence that t violation was the result of an unwarrantable failure by the operator to comply with the rock-dusting standard.

4. The Secretary proved by a preponderance of the evidence that t violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard.

All proposed findings and conclusions inconsistent with the above hereby rejected.

ORDER

WHEREFORE IT IS ORDERED that the order of withdrawal issued on Jan 1980, is AFFIRMED and the contest of order for review thereof is DISMI

William Fauver
WILLIAM FAUVER, JUDGE

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6 MAY 1981

UNITED STATES STEEL CORPORATION, Contestant	:	Notices of Contest
v.	:	Docket No. WEVA 81-263-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 898068
	:	February 2, 1981
	:	Gary No. 9 Mine
	:	Docket No. WEVA 81-290-R
	:	Citation No. 918432
	:	March 2, 1981
	:	No. 20B Mine

DECISION

Appearances: Louise Q. Symons, Esq., United States Steel Corporation Pittsburgh, Pennsylvania, for Contestant;
Robert Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Stewart

The above-captioned contest proceedings were brought pursuant to tion 105(d) of the Act 1/ by United States Steel Corporation (hereinaf

1/ Section 105(d) of the Act provides:

"If, within 30 days of receipt thereof, an operator of a coal or mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a no cation of proposed assessment of a penalty issued under subsection (a) (b) of this section, or the reasonableness of the length of abatement fixed in a citation or modification thereof issued under section 104, any miner or representative of miners notifies the Secretary of an int to contest the issuance, modification, or termination of any order iss under section 104, or the reasonableness of the length of time set for ment by a citation or modification thereof issued under section 104, t

March 19, 1981. The parties were in agreement as to the facts herein and limited their presentations to stipulations of fact 2/ and oral argument.

Citation No. 898068 was issued on February 2, 1981, pursuant to section 104(a) of the Act, 3/ citing a violation of 30 C.F.R.

Footnote 1 (continued)
Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representative of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for for hearing appeals of orders issued under section 104."

2/ Before presenting oral arguments, the parties entered into the following stipulations on the record:

"We agree that the judge has jurisdiction over this case. We agree that United States Steel Corporation is categorized as a large operator under the Mine Safety and Health Administration Act. We agree that a citation was issued to the Gary No. 9 Mine on February 2, 1981 concerning a violation of 75.303, and we agree that that Citation No. 898068 was vacated by the Mine Safety and Health Administration on March 2, 1981.

"Another citation was issued to Gary No. 20 B Mine on March 2, 1981, while the Mine has not received a copy of the notice of, vacating that citation, counsel has been given a copy of a notice vacating Citation No. 9184 dated March 9, 1981, today.

"At both mines during this period and continuing to the present, an examination of the belts was made during each shift by certified people as required by 30 C.F.R. § 75.303."

3/ Section 104(a) of the Act provides:

"If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act."

follows:

4/ 30 C.F.R. § 75.303, a mandatory standard reproducing section 303(d) of the Act, reads as follows:

"(a) Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. Each such examiner shall examin every working section in such workings and shall make tests in each such wor ing section for accumulations of methane with means approved by the Secretar for detecting methane, and shall make tests for oxygen deficiency with a per missible flame safety lamp or other means approved by the Secretary; examine seals and doors to determine whether they are functioning properly; examine and test the roof, face, and rib conditions in such working section; examine active roadways, travelways, and belt conveyors on which men are carried, approaches to abandoned areas, and accessible falls in such section for hazards; test by means of an anemometer or other device approved by the Secretary to determine whether the air in each split is traveling in its proper course and in normal volume and velocity; and examine for such other hazards and violations of the mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require. Belt conveyors on which coal is carried shall be examined after each coal-producing shift has begun. Such mine examiner shall place his initials and the date and time at all places he examines. If such mine examiner finds a condition which constitutes a violation of a mandatory health or safety stan dard or any condition which is hazardous to persons who may enter or be in such area, he shall indicate such hazardous place by posting a "danger" sign conspicuously at all points which persons entering such hazardous place woul be required to pass, and shall notify the operator of the mine. No person, other than an authorized representative of the Secretary or a State mine inspector or persons authorized by the operator to enter such place for the purpose of eliminating the hazardous condition therein, shall enter such pla while such sign is so posted. Upon completing his examination, such mine examiner shall report the results of his examination to a person designated by the operator to receive such reports at a designated station on the surfa of the mine, before other persons enter the underground areas of such mine t work in such shift. Each such mine examiner shall also record the results o his examination with ink or indelible pencil in a book approved by the Secre tary kept for such purpose in an area on the surface of the mine chosen by the operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

"(b) No person (other than certified persons designated under this § 75.303) shall enter any underground area, except during any shift, unless an examination of such area as prescribed in this § 75.303 has been made within 8 hours immediately preceding his entrance into such area." (Emphasi added.)

An examination of 9 Right (I.D. 039) section belt conveyor on which coal was being carried was not made, without delay, after the coal-producing shift had begun. The belt conveyor was started at 10:05 a.m. and the section foreman said that he planned to start the examination sometime after 1:00 p.m.

Citation No. 898068 was vacated on March 4, 1981. The justification given for this action was as follows: "Citation No. 898068 is hereby vac due to advice from the Solicitor's Office that the citation was technical issued in error."

Citation No. 918432 was issued on March 2, 1981, pursuant to section 104(a) of the Act, also citing a violation of 30 C.F.R. § 75.303. The co tion or practice cited therein was as follows:

According to the records, February 6, 1981 was the last date of record that examinations were conducted without delay, after each coal producing shift had begun, of belt conveyors that coal is carried upon and the mine contains 4 (four) productive sections. Coal is produced on all 3 shifts at this mine.

Citation No. 918432 was vacated on March 9, 1981. The justification given as follows: "According to instructions received from the Solicitor Office and the Administrative Law Judge, this citation as refers to 30 C. § 75.303 is hereby vacated." 5/

The particular provision of section 75.303 directly at issue herein the third sentence of the standard, reading: "Belt conveyors on which co is carried shall be examined after each coal-producing shift has begun." was the position of U.S. Steel that section 75.303 does not specify the particular time at which such inspection was to be carried out and that a examination at anytime during a shift would be sufficient for compliance. a motion to dismiss, filed on March 17, 1981, MSHA agreed with the positi of U.S. Steel as to the proper interpretation of the cited standard. 6/

5/ In Secretary of Labor v. Consolidation Coal Company, 2 FMSHRC 1809 (1 the judge held that 30 C.F.R. § 75.303 did not require an examination of *conveyors on which coal is carried immediately upon the start of a produc* shift.

6/ MSHA asserted the following in its motion:

"When the issuance of the citation came to the attention of National MSHA officials, they consulted with appropriate field offices and MSHA di trict managers and supervisory personnel in the affected areas were infor that MSHA's current policy does not require that onshift examinations beg immediately after the start of a shift, but only requires that such exami tions be completed during each shift.

In its oral presentation, MSHA reiterated that it agreed with the tion of U.S. Steel as previously expressed in MSHA's motion to dismiss. Counsel for MSHA stated:

> In the motion, * * * we admitted that the violations were issued at the various mines, and we admitted that the violations were issued in error because they were issued because it appeared to the Federal mine inspectors when they came into the mine and looked at the examination books that the onshift examinations had not been made immediately after the start of the shift and, therefore, they issued citations because they believed in good faith that the MSHA policy was that the onshift examinations were required to be made immediately upon the start of the shift. * * *
>
> There is one decision on this matter. It was issued by Judge Merlin in Secretary of Labor v. Consolidation Coal Company, PENN 79-105. It was issued July, 1980, and stated that this standard only requires belt conveyors on which coal is being carried to be examined after each coal-producing shift has begun. There is no requirement that the examination take place immediately.

The actual words of the Judge in Consolidation Coal Company, 2 FM 1809 (1980) (hereinafter, Consolidation Coal Company), were:

> I conclude that the mandatory standard requires only that belt conveyors on which coal is carried be examined after each coal-producing shift has begun. There is no requirement of immediate examination of belt conveyors after the start of a production shift. Indeed there is no time requirement at all except that the examination occur during the shift.

At oral argument, MSHA stated that it was presently following this pol informed its personnel that it was the policy that they should follow, that it was a fair interpretation.

The MSHA Inspection Manual states that the examination of belts o men are not transported shall be started without delay after each coal producing shift which has begun. With regard to assertions that its M

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footnote 6 (continued)

"Instructions in the Coal Mine Inspection Manual, which indicate different enforcement policy with regard to 30 C.F.R. § 75.303, are no current. In fact, MSHA's enforcement policy with regard to 30 C.F.R. § 75.303 is currently under review and once completed, new enforcement guidelines will be published and enforced. In the interim, because of recent instructions now given to MSHA personnel in the affected areas, unlikely that recurring citations of this nature will be issued to min operators."

enforcement policy is currently under review and that new enforcement guid lines will be published, counsel stated:

> We did not imply or did not mean to imply that we are going to change our policy and not follow Judge Merlin's decision. We just feel that our entire enforcement policy on this matter, including preshift examinations which were not the subject of this case, is under review.
>
> We are not trying to change this decision or what the law is by new policy. It is a matter of interpretation and we feel that we have no disagreement with Judge Merlin's interpretation.

MSHA presented the following as background to the matter:

> I think there is no question that we feel that the operator here did conduct an adequate preshift examination of the coal-carrying belts which was performed 3 hours before the beginning of the shift. A West Virginia law requires preshift examinations of coal-carrying belts 3 hours before the start of the shift and the operator is complying with that. So, in view of that, we now feel that the operator is meeting the requirements of 30 C.F.R. § 75.303 if he examines the belts at some time during the shift and if that examination is completed.

MSHA acknowledged that if the conveyor were preshifted within 3 hours of the start of the shift, the requirement to examine the belt immediately after the start of the shift would in effect require two examinations with hours and that such a requirement might be harsh. MSHA stated that beca of the 40 miles of belts, there would be people walking belts all day long because as soon as they finished their preshift examination they would hav to start their onshift examination. MSHA conceded that the language on it face does not require the operator to begin his onshift examination immedi ately upon the start of the shift and that it was his option to conduct th onshift examination along with the State-required preshift examination.

The citations have been vacated, but, when an operator contests a cit ion, the Secretary cannot deprive the Commission of jurisdiction by vacat such citation. Climax Molybdenum Company v. Secretary of Labor, and Oil, Chemical and Atomic Union, Local 2-244 1 MSHC 2538 (1980) (hereinafter, Climax). In Climax, the Secretary concluded that he could not prove that violations occurred. He vacated the citations and moved that the operator notices of contest be dismissed as moot. The vacation of the citations wa not challenged but the operator sought a declaratory order interpreting th standard alleged by the citations to have been violated. The Commission, denying the operator's request for declaratory relief, stated that the Sec ary's motion to dismiss the operator's notices of contest should have bee granted only upon terms and conditions that the judge deemed proper; howev

the only appropriate relief which should have been granted by the judge in that case was to vacate the citations in question with prejudice. To erase any doubt as to whether the citations had been dismissed with prejudice the Commission entered an "adjudication on the merits and vacated the citations with prejudice." 7/

The approach taken in Climax will also be taken here. Rather then sim granting MSHA's motion to dismiss, the citations are vacated with prejudice It is found that Citation Nos. 898068 and 918432 issued to U.S. Steel were terminated on terms in accordance with the Act. MSHA conceded that section 75.303 does not require that coal-carrying belt conveyors be inspected with delay after a coal-producing shift has begun and that they may be examined any time during the shift. MSHA's enforcement personnel have been instruct accordingly. The language of section 75.303 and the corresponding statutor provision do not specify the time at which inspections of belt conveyors on which coal is carried must be made, other than that such inspection must ta place after the coal-producing shift has begun.

Declaratory Relief

At oral argument, counsel for U.S. Steel moved for leave to amend its notices of contest to include as relief requested a declaratory order inter- preting section 75.303. 8/ Counsel for MSHA resisted the motion for a

7/ Section 104(h) of the Act states:

"Any citation or order issued under this section shall remain in effec until modified, terminated or vacated by the Secretary or his authorized representative, or modified, terminated or vacated by the Commission or the courts pursuant to section 105 or 106."

Commission Rule 1(b) states:

"Applicability of other rules. On any procedural question not regulate by the Act, these Procedural Rules, or the Administrative Procedure Act (particularly 5 U.S.C. §§554 and 556), the Commission or any judge shall be guided so far as practicable by any pertinent provisions of the Federal Rule of Civil Procedure as appropriate.

"Fed.R.Civ.P. 41(a)(2) states in part:

"(a) Voluntary dismissal: Effect Thereof.

* * *

"(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff' instance save upon order of the court and upon such terms and conditions as the court deems proper. * * * Unless otherwise specified in the order, a dis missal under this paragraph is without prejudice." (Emphasis added.)

8/ Section 105(d) states in part:

"If * * * an operator of a * * * mine notifies the Secretary that he intends to contest the issuance of [a] * * * citation * * * the Secretary sh immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with [5 U.S.C. §554 * * *), and thereafter shall issue an order, based on findings of facts, affirming, modifying, or vacating the Secretary's citation * * * or directi other appropriate relief * * *." (Emphasis added.)

hat it had conceded that section 75.303 did not require an inspection of elt conveyors on which coal is carried without delay after the beginning he shift, that the citations had been vacated, and that steps had been ta o insure that inspectors would no longer issue such citations pending rev ion of the Inspection Manual. While MSHA stated that there might be chan n the inspections regarding preshift examinations when review of the nspection Manual was completed, it acknowledged that the decision in onsolidation Coal Company was correct and would be followed.

With the parties in accord on the provisions of the standard with espect to the time that inspections of belt conveyors carrying coal must ade, the remaining issue in this case involves to some extent the outdate rovisions of the Inspection Manual which are now under review. The stand issue is only one part of the statutory inspection scheme set forth in ection 75.303 of the Act under the general heading "Ventilation." That s ion also requires certain inspections within 3 hours immediately precedin he beginning of any shift, at the start of each shift, at least once duri ach coal-producing shift, and at least once each week. Certain persons a rohibited from entering until the results of some of these examinations a eported to the surface. The section also prohibits the entry of persons nder certain conditions unless some of the examinations have been made ithin 8 hours. These requirements should be considered in conjunction wi ny interpretation under which an inspection could be started at the begin f one shift and the next inspection need not be completed until the end o he succeeding shift. Due to the possible impact of some of these provisi n others also contained in section 75.303, MSHA properly argues that a re s necessary before changes are made in inspection procedures. The standa rescribes the time for inspections of belt conveyors on which coal is car n the general terms "after each coal-producing shift has begun." MSHA no onger considers this to mean "without delay" after each coal-producing sh as begun and it has taken appropriate steps to insure that Contestant is gain wrongfully cited for failure to make such inspections without delay. ith the ruling by the Administrative Law Judge in Consolidation Coal Comp nd the concessions by MSHA in its motion and on oral argument, it would n prudent to prescribe with more exactitude by declaratory order the time which inspections of coal-carrying belt conveyors should be made. The ecord does not establish the harm, if any, to Contestant caused by the is ace of the citations and it is unlikely that Contestant will suffer harm rom the same misinterpretation of the standard in the future. Moreover, eason has been advanced which would warrant risking disturbances of the atutory scheme of inspections by additional interpretation. The record hese cases does not contain all of the relevant evidence to afford full c deration of the effects of any different interpretations. It is prefera hat further interpretation of the standard involved herein be made on a c -case basis and that any changes in inspection procedures by MSHA within ounds of the standard should be made only after careful review. Of cours hanges beyond the bounds of the standard should be made only by amendment the standard.

law judge interpreting section 75.303 so that it has another piece of paper to hand to enforcement personnel to show them that the law does not require that the examination be started immediately after the shift has begun. Afte holding in Consolidation Coal Company that the mandatory standard requires only that belt conveyors on which coal is carried be examined after each coal-producing shift has begun, the judge stated that there is no requiremer of immediate examinations of belt conveyors after the start of a production shift and indeed there is no time requirement at all except that the examina tions occur during the shift. There is little more that a judge could do t interpret the standard more broadly in favor of the position of the operato even if that were to be his decision after consideration of a full record. The interpretation in Consolidation Coal Company has already been adopted b MSHA. A repetition of this interpretation in a declaratory order without the benefit of a full record, as now urged by U.S. Steel, would not only be inappropriate, but would have no significant effect on inspection procedure As in Climax, where a request for a declaratory order was denied, a ruling the judge "would [be] nothing more than an advisory opinion based upon a hy thetical state of facts." Furthermore, there are insufficient facts, either stipulated or hypothetical, in the instant cases of the precision and scope necessary to provide a proper basis for a meaningful interpretation.

U.S. Steel also urges that another administrative law judge's ruling in a declaratory order would give the Mine Safety and Health Administration another chance to decide if they want to seek discretionary review by the Commission. MSHA has conceded that the decision in Consolidation Coal Company was a fair interpretation of the standard and did not seek discretionary review so even if the interpretation in a declaratory order were to be as broad as in that decision, it is not likely that discretionary review would be sought by MSHA. At oral argument, MSHA stated that if it had want another decision, it certainly would not have vacated the citations, but wo have put on testimony as to why the examination should have been conducted immediately after the start of the shift and would have made a full record by calling witnesses interested in the provision and how it is interpreted. MSHA asserted that it had not chosen to do so and had no intention of doing so. MSHA has stated that it is in agreement with U.S. Steel as to the requirements of section 75.303 and that it is unlikely that discretionary review by the Commission would be sought for vacation of the citations in this decision.

MSHA and U.S. Steel are in agreement on the current policy which has been disseminated to the inspectors and the Inspection Manual is under review. It is unlikely that similar citations will be issued. The issuance of a declaratory order is not necessary to afford U.S. Steel relief in this matter and would not be prudent at this time. Accordingly, Contestant motion for leave to amend is DENIED.

ORDER

Citation Nos. 898068 and 918432 are VACATED WITH PREJUDICE.

Forrest E. Stewart
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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7 MAY 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. LAKE 80-299-M A.C. No. 12-00084-05005
v.	:	
MULZER CRUSHED STONE COMPANY, a Partnership, Respondent	:	

DECISION

Appearances: Steven E. Walanka, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois for Petitioner; Philip E. Balcomb, Mulzer Crushed Stone Company, Tell City, Indiana, for Respondent.

Before: Administrative Law Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This is a proceeding filed by the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA) under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (hereinafter the Act) to assess a civil penalty against Mulzer Crushed Stone Company (hereinafter Mulzer) for a violation of a mandatory standard. The proposal for assessment of a civil penalty alleges a violation of 30 C.F.R. § 56.12-25 in that the surge tunnel feeder did not have a frame ground.

The parties filed preliminary statements and a hearing was held in Evansville, Indiana on February 24, 1981. Inspector George LaLimondiere testified on behalf of MSHA. Nelson R. Paris testified on behalf of Mulzer. Both parties submitted posthearing briefs.

ISSUES

Whether Mulzer violated the Act or regulations as charged by MSHA and, if so, the amount of the civil penalty which should be assessed.

APPLICABLE LAW

30 C.F.R. § 56.12-25 provides as follows: Mandatory. All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment.

Section 110(i) of the Act, 30 U.S.C. § 820(i), provides in pertinent part as follows:

> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalties, the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

STIPULATIONS

The parties stipulated the following:

1. That the Administrative Law Judge had jurisdiction in matters related to the Mine Safety and Health Act of 1977.

2. That the inspector who issued the citation was a duly authorized representative of the Secretary of Labor.

3. That the size of the mine as to production of tons or man-hours per year is 179,118.

4. That the size of the company as to production tons or man-hours per year is 469,971.

5. That the proposed assessment will not harm Respondent's ability continue its operations.

6. That Citation No. 366846 has been terminated.

7. That Respondent owned and operated a surge tunnel feeder motor o March 12, 1980.

8. That Respondent operates a limestone (crushed and broken) type facility.

9. That Respondent is doing business under the Act and that it is u the commerce provision of the Act.

SUMMARY OF THE EVIDENCE

MSHA contends that the flexible conduit which connected the feeder m and the solid conduit was the only source of grounding for the motor, and since this flexible conduit was broken off, Mulzer violated 30 C.F.R. § 56.12-25 in not providing a ground or equivalent protection. MSHA Insp tor, George LaLumondiere, testified that during the course of his regular inspection conducted at Cape Sandy Quarry on March 11, 12, 13, 1980, he

examined the surge tunnel motor for a source of a ground. The only one he observed was the flexible conduit. Although he made no tests for continuity, he assumed that the motor was not grounded since the flexible conduit was loose and not connected to the solid conduit on the belt frame.

Mulzer contends that the flexible conduit was only one of three possible sources of grounding. Mulzer's chief electrician, Nelson Paris, testified that the other sources are the power company's system and the six ground rods located behind the switch house. Mulzer maintains that the conduits provide a ground by covering the wires which transport power to the motor from a starter switch and fuse disconnect mounted on the tunnel wall. The starter box is grounded, thus making the conduit part of another grounding path. Paris explained, however, that the primary purpose of the flexible conduit is to protect the wires from flying material and vibration, and not to provide a ground.

MSHA maintains that the motor frame could not provide a solid ground because the bolts, frame and equipment were rusted. The inspector testified that the frame was bolted to the conveyor belt frame and that the bolts were rusty. Although he did not remove the bolts to examine whether they were rusty inside, he assumed from his prior experience that they were. While concluding that there could be no good ground because of the rusty conditions, he admitted that it is possible to have a solid ground if only the surface of the bolts were rusted. The inspector stated that he made no tests of the equipment because he had no instruments, and would have had to call another inspector to check the grounding efficiency.

Mulzer contends that a primary ground, satisfying the safety standard, is provided by the firm attachment of the motor frame to the grounded conveyor structure. Although Mr. Paris had never seen four loose bolts, he testified that the mere weight of the motor would be capable of carrying a ground even in the absence of the bolts. Six to eight weeks prior to the inspection, the system's grounding capabilities were checked. At that time, the ohm meter read zero ohms, and the system was determined to have good continuity. From this reading Mulzer assumed that the bolts were not rusted on the inside. Mr. Paris stated that, after the citation was issued, the company did not make any electrical tests to determine whether there was adequate grounding. They felt there was no need since the motor was still secure to the frame.

Mulzer argues that the fact that the feeder motor was running at the time of inspection, is evidence that the motor was securely attached to the frame, providing a good grounding path. It claims that in order to maintain the necessary tension on the V-belts sufficient to transmit power from the motor to the feeder, the bolts must be tightened firmly. Therefore, although the bolts were rusted on the exterior, they still provided sufficient pressur to establish intimate contact between the motor and the grounded frame.

At the hearing, the inspector admitted that he was not an electrician. He stated that he has had specific electrical training and previously had

Mr. Paris testified that he has been an electrician for 37 years. He was involved in the installation of the electrical system at the quarry, supe vising its open delta system.

DISCUSSION

Having considered all the testimony, evidence, and written arguments submitted in this case, I find that MSHA has failed to prove the fact of violation. MSHA alleged a violation of 30 C.F.R. § 56.12-25, yet it has not shown that the surge tunnel motor was not, in fact, grounded.

MSHA maintains that the flexible conduit was the only source of grou ing for the motor. It cited Mulzer for a violation of 30 C.F.R. § 56.12- since the flexible conduit was broken off and could not provide a groundi path. As evidenced by the testimony of the inspector, MSHA's conclusion was based only upon the inspector's visual observations of the motor. He made no tests for continuity and relied only upon his experience in findi a violation.

MSHA also contends that the frame was not a source of grounding because the bolts, frame and equipment were rusted. It was unable, howev to show that the bolts were rusted on the inside. Since the inspector testified that he did not remove the bolts to examine their condition, MS has not demonstrated the ineffectiveness of the bolts in securing the mot to the frame. Again, the inspector made no tests of the frame's groundin efficiency.

Mulzer's conclusion that the detached flexible conduit was not suffi cient to sustain a violation of 56. 12-25 is supported by the evidence of alternative grounding sources. Mr. Paris' testimony indicates that the f of the motor provided an effective ground. Mr. Paris testified that the weight of the motor, even in the absence of bolts, kept the motor secure the frame for an adequate ground. This evidence demonstrates the inconse quentiality of a rusted exterior on the equipment's ability to provide a ground.

In their briefs, the parties raise the issue of a violation of 30 C. § 56.18-2 regarding shift inspections. Since MSHA has not cited Mulzer w a violation of this safety standard, it is not a relevant consideration i this proceeding.

Having found that MSHA has not established the fact of violation, it is not necessary to examine the remaining criteria of section 110(i) of t Act. Therefore, the citation alleging a violation of 30 C.F.R. § 56.12-2 must be vacated and this proceeding dismissed.

WHEREFORE, IT IS ORDERED that Citation No. 366846 alleging a violation of 30 C.F.R. § 56.12-25 is vacated and this civil penalty proceeding is DISMISSED.

James A. Laurenson, Judge

Issued:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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7 MAY 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Complaint of Discharge, Discrimination, or Interference
	:	Docket Nos. WEVA 81-71-D
Ex rel. THOMAS C. WHITE, Complainant	:	HOPE CD 80-71
	:	No. 15-A Mine
v.	:	
VALLEY CAMP COAL COMPANY, Respondent	:	

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Complainant; Robert S. Stubbs, Esq., Jackson, Kelly, Holt & O'Farrell, Charleston, West Virginia, for Respondent.

Before: Judge Melick

This case is before me upon the complaint by the Secretary of Labor on behalf of Thomas C. White pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging that Mr. White was unlawfully discharged by the Valley Camp Coal Company (Valley Camp). An evidentiary hearing was held on February 10, 1981, in Charleston, West Virginia.

The specific issue in this case is whether Mr. White was unlawfully discharged by Valley Camp under section 105(c)(1) of the Act because of his safety-related activities at Valley Camp's No. 15-A Mine. Section 105(c)(1) reads in part as follows:

> No person shall discharge or in any other manner discriminate against * * * or otherwise interfere with the exercise of the statutory rights of any miner, [or] representative of miners * * * because such miner [or] representative of miners * * * has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the

operator's agent * * * of an alleged danger or safety or health violation in a coal or other mine * * * or because of the exercise by such miner [or] representative of miners * * * on behalf of himself or others of any statutory right afforded by this Act.

If the Complainant proves by a preponderance of the evidence that he was engaged in a protected activity and that his discharge by the operator was motivated in any part by the protected activity then he has established a prima facie case under this section of the Act. Secretary ex rel. Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (October 1980). For the reasons set forth below, I find that Mr. White has indeed established such a case here.

Before his discharge on June 19, 1980, White was employed at the Valley Camp No. 15-A Mine as a beltman and was chairman of the union mine committee and the union health and safety committee. White was subsequently reinstated to his job with back pay as the result of an arbitration decision rendered August 18, 1980. White here seeks only a finding that he was unlawfully discharged for engaging in activities protected by section 105(c)(1) of the Act, and an order that his employment records be expunged of any reference to that discharge. 1/

It is undisputed that White had, over an extended period of time, engaged in various activities which are clearly protected under section 105(c)(1). More particularly, Valley Camp concedes that White had "actively and vigorously enforced health and safety rights" and had always been active in reporting safety violations to the company and to state and Federal authorities. The last of these protected activities occurred on June 18, 1980. On the morning of that date, White was directed by Jeff Schoebel, the general mine superintendent, to replace certain roof bolts to correct a deficiency previously discovered by an MSHA inspector. White later decided that it was unsafe for him to work at the task without assistance. He telephoned outside the mine, reaching assistant superintendent Ray Lyons. He told Lyons of his safety concerns and requested alternate work. Lyons complied with the request but on the next day gave White a notice of suspension-with-intent-to-discharge.

While conceding that White had engaged in these protected activities, Valley Camp argues that its discharge of White was not motivated in any part

1/ The Secretary of Labor also petitions in this case on its own behalf for an order assessing a civil penalty against Valley Camp for violations of section 105(c) of the Act. The Secretary withdrew this request at hearing acknowledging that the operator had not been given its rights pursuant to 30 C.F.R. Part 100. Valley Camp agreed however, to permit the introduction of evidence in the instant case regarding penalty criteria under section 110(i) of the Act and to waive its right to a subsequent hearing should any penalty be proposed and to allow the administrative law judge to render a decision in any subsequent penalty case arising before the Commission based on the record in this proceeding.

tanding absenteeism policy. I conclude, however, that White's discharge ndeed motivated at least in part by his protected activities. In reaching conclusion I have necessarily relied upon circumstantial considerations. nsideration is the close proximity in time between White's last protected ity and his discharge. He refused to perform work because of allegedly e conditions on June 18, 1980, and was discharged early the next day. er consideration is the evidence of threats and expressions by mine man- nt of ill-will toward White because of his safety-related activities. It contradicted that mine superintendent John Necessary had told White in 1980 following a dispute over the abatement of an alleged safety viola- that he did nothing but cause the company trouble. It is also undisputed around April 1980, following another argument over safety conditions in ine, Necessary threatened to fire White and to bar him from future yment in the coal industry. Around the same time, mine foreman James threatened physical injury to White after White had demanded safety s for a mantrip. While it is true that Ray Lyons, the official who lly made the final decision to discharge White, was not among those to these remarks have been attributed, there is no doubt that he was sub- co the influence of a clearly pervasive management attitude toward 's safety activities.

The final consideration supporting my conclusion is the assertion by y Camp of what I find to have been a flimsy pretext for its discharge ite, i.e., an alleged violation of a purported absentee policy. Valley s own evidence shows that while this so-called absentee policy had been fect for as long as 10 years, until 1980 no one had ever been discharged it. Moreover, it was not a written policy and the unwritten policy, ostensibly had been reannounced to all employees at a December 10, 1979, y meeting, was subject to widely varying interpretations even among man- nt. 2/ According to Assistant Superintendent Lyons, the policy consisted ur steps. First, if an employee were absent for 2 days within a 30-day d without medical excuse he would receive a verbal warning. Second, after lmilar absences (for 2 days without medical excuse) in any subsequent ys, the employee would receive a written warning. After a third similar ction, the employee would receive a 3- or 5-day suspension. After a n similar infraction, the employee would be discharged. According to Foreman Lucas, on the other hand, it was only a three-step process and ctions other than unexcused absences could also be considered. Finally, ding to statements attributed by Harold Knight, one of Valley Camp's wit- s, to superintendent John Necessary, management never intended in any to uniformly enforce the policy that was announced to employees on ber 10. I conclude from this evidence that indeed Valley Camp never had ingle uniformly enforced absentee policy but rather had many policies ly interpreted by each official and which could be arbitrarily invoked eir convenience to mask unlawful motivation for personnel action.

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written absentee policy was subsequently issued on September 15, 1980.

Even assuming, arguendo, that the four-step "policy" described
Lyons was indeed invoked against White as alleged by Valley Camp, I
it was an erroneous invocation because Valley Camp considered as the
step a violation that predated the announcement of the policy. Acc
Valley Camp, White received the first warning from Superintendent Ne
on December 3, 1979, but Valley Camp did not announce to employees t
policy was going to be enforced until the December 10, 1979, safety
The newly announced policy was admittedly to be enforced only prospe
after that date. Within this framework of evidence I conclude that
at most only three infractions under the program. Valley Camp's dis
White under a four-step policy was therefore unwarranted. Under all
cumstances I conclude that the alleged invocation of such an absente
was indeed only a thinly disguised pretext for the discharge of Whit
accordingly persuaded that White's discharge was motivated by his pr
safety-related activities.

It is apparent from the foregoing discussion that Valley Camp's
tive argument must also fail. It claimed that even assuming part of
motive for discharging White was unlawful, it was also motivated by
unprotected violation of its absentee policy and that it would have
White in any event for his violation of that policy. Pasula, supra
2800; Secretary ex rel. Robinette v. United Castle Coal Company, 2 F
(April 3, 1981). As the Commission said in Pasula, supra, on these
the employer must bear the ultimate burden of persuasion. The emplo
show that it did in fact consider the employee deserving of discipli
engaging in the unprotected activity alone and that it would have di
him in any event. Inasmuch as I have concluded that Valley Camp did
relevant times have in effect any clear, nondiscriminatory absentee
and that even assuming that it had such a policy and that policy was
one invoked against White, that it was not properly invoked, it foll
Valley Camp has not met this burden of persuasion. I therefore conc
Mr. White was discharged in violation of the provisions of section 1
of the Act.

ORDER

It is ORDERED that Respondent expunge from its employment recor
reference to its discharge of Thomas C. White on June 19, 1980.

Gary Melick
Administrative Law Judge

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MAY 11 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. YORK 80-123-M
	:	A.O. No. 19-00283-05005
v.	:	Assonet Mine & Mill
ASSONET SAND & GRAVEL CO., Respondent	:	

DECISION

Appearances: David L. Baskin, Attorney, U.S. Department of Labor, Boston, Massachusetts, for the petitioner.

Before: Judge Koutras

Statement of the Case

This proceeding was initiated by the petitioner against the respondent through the filing of a proposal for assessment of civil penalties pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), proposing civil penalties for five alleged violations of certain mandatory safety standards promulgated pursuant to the Act. A hearing was held in Providence, Rhode Island, on April 1, 1981, and while the petitioner appeared pursuant to notice, respondent did not.

Issues

The issues presented in this proceeding are: (1) whether responden has violated the provisions of the Act and implementing regulations as alleged in the petition for assessment of civil penalties, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues are identified and disposed of in the course of this decision.

In determining the amount of civil penalty assessments, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriatene of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violations, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violations.

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Discussion

I consider the respondent's failure to enter an appearance at the hearing to be a waiver of any further rights to be heard in this matter. In the circumstances, I ruled that respondent was in default, the hearing proceeded as scheduled, and petitioner presented testimony and evidence in support of the citations which were issued in this case as well as its proposal for assessment of civil penalties.

With regard to the failure by the respondent to enter an appearance in this case, the record reflects that the notices of hearing in these proceedings were mailed to the parties by registered mail on February 5 and March 20, 1981, and the return postal service registered mail receipts reflect that both the petitioner and the respondent's counsel received actual notice of the hearing. Although the starting time of 9:30 a.m., was delayed until 10:30 a.m., at the request of petitioner's counsel, respondent's counsel was notified of the one-hour delay through telephone calls made to his office on the afternoon of Tuesday, March 31, 1981, the day before the scheduled hearing, both by petitioner's counsel as well as my secretary. Additional calls were made on the morning of April 1, 1981, both by petitioner's counsel as well as my secretary in an effort to ascertain the whereabouts of respondent's counsel. His answering service confirmed that counsel had received the previous messages concerning the one-hour delay in the starting time of the hearing, but efforts to ascertain his whereabouts were to no avail. Further, petitione counsel stated that prior attempts by him to contact respondent's counsel for the purpose of discussing the case in preparation for the hearing and exploring possible stipulations were unsuccessful.

I was present at the hearing room from 9:00 a.m. on April 1, 1981, until the conclusion of the hearing at approximately 1:00 p.m., and at no time did respondent's counsel appear. The hearing began at 10:30 a.m., and concluded at approximately 1:00 p.m. In view of the foregoing circumstances, I can only conclude that respondent's counsel never intende to enter an appearance, and his failure to do so has resulted in responden being held in default. I conclude that respondent has been given more than an adequate opportunity to be heard, and I conclude that respondent has waived its right to any further hearing and that the issuance of any show-cause order would be a fruitless gesture. I have considered this case de novo and my decision in this regard is made on the basis of the evidence and testimony of record as presented by the petitioner in support of its case at the hearing.

P-8, are as follows:

Citation No. 222590, 5/14/80, 30 CFR 56.14-6

A section of a guard that was provided for the tail pulley on the 3/8" conveyor was removed and not replaced. There was one man in the area. The pinch points were exposed.

Citation No. 222591, 5/14/80, 30 CFR 56.14-6

A guard that was provided for the tail pulley of the 3/5" stone conveyor was constructed of light weight expanded metal. A plant employee bent the side of the guard up to a right angle to the conveyor frame which exposed the tail pulley pinch point. There was one man in the area.

Citation No. 222592, 5/14/80, 30 CFR 56.14-6

The top section of a guard that was provided for the V-belt drive on the scalping screen was removed and not replaced. The pinch points were exposed. There was one man in the area.

Citation No. 222593, 5/14/80, 30 CFR 56.14-6

A guard that was provided for the fly wheel on the scalping screen was removed and not replaced. There was one man in the area.

Citation No. 222537, 5/20/80, 30 CFR 56.11-2

A hand railing that was provided for the elevated walkway around the tail pulley of the upper swing sand conveyor was removed and not replaced. One man works in the area. The height is approximately 20 feet.

Testimony and Evidence Adduced by the Petitioner

MSHA inspector Earl Giovanni confirmed that he conducted an inspection of respondent's mining operation on May 14, 1980, and was accompanied by plant foreman Frank Ferriera. The mine in question is a sand and gravel operation, was in operation at the time of the inspection, and the mine employs approximately five individuals. The plant was in production at the time of the inspection, and he confirmed the existence of the conditions and practices which he cited in each of the citations which he issued on May 14, and confirmed that they were violations of the cited mandatory safety standards (Tr. 17-47); exhibits P-1, P-2, P-3, and P-4). He also confirmed the conditions cited in a citation which he issued on May 20, 1980, and testified that the conditions were in violation of mandatory safety standard section 56.11-2 (Tr. 47).

With regard to citation no. 222590, Mr. Giovanni testified that the guard which had been installed at the tail pulley location which was cited had been cut away with an acetylene torch to facilitate access to the tail pulley bearing. The opening was large enough for a person to place his hand through, and in doing, he would have contacted the pulley pinch points. He also stated that a plant laborer admitted cutti out the hole so that he could service or oil and grease the bearing (Tr. 18-19). Although he observed no men in the immediate area during the inspection, he observed some foot prints on the ground around the tail pulley location, and the tail pulley was adjacent to a walkway. He believed that anyone walking by with loose clothing would be in dange of contacting the exposed pinch point, and he believed the condition was dangerous (Tr. 21-22).

With regard to citation no. 222591, the inspector testified that the guard installed for the tail pulley in question was marginal in that it was constructed of very light mesh wire. The guard had been bent up at a right angle, thereby completely exposing the entire end of the tail pulley. He believed that someone had bent the guard in such a fashion to facilitate greasing and Mr. Ferriera confirmed that this was true. The pulley was running at the time of the inspection, the cited condition was obvious, and persons had to walk by the location to reach a nearby walkway (Tr. 27-28).

Mr. Giovanni testified that citation no. 222592 was issued because a guard which had been provided for the V-belt drive and scalping screen had been removed and was lying within six feet of the screen in the walk and had not been replaced. Mr. Ferriera admitted that someone forgot to put the guard back on the equipment, and the inspector believed it had been taken off to change a belt and had been off for four days (Tr. 32-3

Inspector Giovanni testified that citation no. 222593 was issued af he observed that a guard which had been provided for the flywheel on a scalping screen had been removed and left lying on an adjacent walkway. The screen was the same one previously cited in citation no. 222592, but the flywheel in question was on the opposite side of the screen drive pulley previously cited (Tr. 37). There was evidence that the guard weld had broken and that the guard had never been replaced. The conditi was obvious and someone could have been injured if their hand or arm were caught in the unguarded flywheel (Tr. 39). The scalping screen, flywheel, and V-belt were all running when he observed the conditions (Tr. 44).

Citation No. 222537 was issued after the inspector observed that the plant operator had removed the hand railing on an elevated walkway around the tail pulley of a swinging sand conveyor, and the plant laborer admitted that he did so because it was in his way (Tr. 47-48). The railing citatation was the second one he issued for the same locatio and the previous one was issued on August 21, 1979, for the very same condition (Tr. 48). The platform location was some 20 feet off the grou and he observed a laborer working on the platform cleaning sand off the platform at the time of his inspection (Tr. 49).

Fact of violations

I conclude and find that the testimony and evidence adduced by the petitioner establishes the fact of violation as to each of the citations issued in this case. Accordingly, all of the citations are AFFIRMED.

History of prior violations

Inspector Giovanni testified that during prior inspections which he conducted on August 21, 1979, he issued 19 citations, and that another inspector issued eight prior citations during an inspection conducted on May 4, 1978. Included among these are six prior citations for violations of section 56.14-4 6, and eight prior citations for violations of section 56.11-2 (Tr. 15-16). Petitioner's counsel stated that a computer print-out is not available, and that petitioner has no way of knowing whether the violations alluded to by Mr. Giovanni are in fact valid for purposes of establishing a prior history of violations (Tr. 16). One of the prior section 56.11-2 citations was a repeat of the very same handrail citation issued by the inspector. Under the sircumstances, I accept the inspector's testimony as credible evidence of respondent's prior history of violations, and have considered this in assessing the penalties in this case.

Size of business and effect of penalties on respondent's ability to contir in business.

The inspector testified that the plant employed five individuals, and he believed it is a medium-sized operation in terms of comparison with similar plants he had inspected (Tr. 62). I conclude and find that the plant in question is a small-to-medium sized operation, and absent any showing to the contrary, I further find that the penalties assessed for the citations in question will not adversely affect the respondent's ability to continue in business.

Gravity

The inspector's testimony supports a finding that all of the citatior issued in this proceeding were serious (Tr. 27-28, 33-34, 39, 44, 49). The equipment which was unguarded was running, the locations were near or in close proximity to walkways where men obviously passed closely by, and the inspector observed a man working on the elevated platform where the handrail had been removed.

Good faith compliance

The inspector's testimony, as well as the abatement notices, reflect that all of the conditions cited were corrected and abated within the time prescribed by the inspector either by replacing or repairing the guards in question, as well as the missing handrail, and I have considere this in assessing the penalties for the citations which I have affirmed (Tr. 26, 28, 36, 39, 50).

Negligence

The testimony presented by the inspector reflects that the guards which were installed at two locations, citations 222590 and 222591, were deliberately cut away and bent back to facilitate maintenance or greasing In these circumstances, I conclude and find that these two citations resulted from the respondent's reckless disregard of the mandatory safety standards cited, and that the citations amount to gross negligence As for the remaining citations, I conclude that the evidence adduced supports a finding of ordinary negligence in that the respondent failed to exercise reasonable care to prevent the conditions cited.

Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following civil penalties are appropriate and reasonabl for each of the citations which I have affirmed:

Citation No.	Date	30 CFR Section	Penalty Assess
222590	5/14/80	56.14-6	$ 250
222591	5/14/80	56.14-6	250
222592	5/14/80	56.14-6	195
222593	5/14/80	56.14-6	195
222537	5/30/80	56.11-2	210
		Total	$ 1100

Order

The respondent IS ORDERED to pay civil penalties in the amounts shown above, totaling $1,100 within thirty (30) days of the date of this decision and order, and upon receipt of payment by the petitioner, this matter is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

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Assonet Sand & Gravel Company, P.O. Box 7, Ridge Hill Road, Assonet, MA 02702 (Certified Mail)

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 80-332-M A/O No. 45-02140-05004-A
v.	DOCKET NO. WEST 80-333-M A/O No. 45-02140-05005-A
FRANK L. MILES, Respondent, BEN LEILER, Respondent.	Miles Sand & Gravel Company Upper Dickey Pit Silverdale, Kitsap County, Washington

DECISION

APPEARANCES:

Edward R. Fitch, Esq.
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United States Department of Labor
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for the Petitioner

Mr. Frank L. Miles, pro se
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Mr. Ben Leiler, pro se
Miles Sand & Gravel Company
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Auburn, Washington 98002
for the Respondent

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

The above two cases, which were consolidated for hearing, involve alleged violations of section 110(c) of the Federal Mine Safety and Hea Act of 1977.[1]

1/ Whenever a corporate operator violates a mandatory health or safety standard ... , any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation ... shall subject to the same civil penalties, fines, ... that may be imposed upo person under subsections (a) and (d).

are alleged to have "knowingly authorized, ordered, or carried out" the alleged violation of 30 C.F.R § 56.11-1 cited in Withdrawal Order No. 351863, issued May 1, 1979. The cited regulation requires that a safe means of access shall be provided and maintained to all working places. The withdrawal order alleged that an employee was observed walking the reject conveyor belt with a grease gun in his hand. It further alleged that the reject conveyor is 300 feet long and approximately 30 feet abov the ground at its highest point. Both respondents filed written stateme denying the allegations of the petitioner.

FINDINGS OF FACT:

1. On May 1, 1979, Miles Sand & Gravel Company was a corporation a its president was Frank L. Miles, respondent, and the plant superintende was Ben Leiler, respondent. (Exhibits 4 and 5).

2. The mine where the alleged violation took place is a surface sa and gravel mine with seven employees. (Exhibit 5).

3. Miles Sand & Gravel Company has more than one plant location an is a medium sized sand and gravel operation located in the State of Washington. (Tr. 42).

4. Miles Sand & Gravel Company paid a penalty assessment of $150.0 for the violation of 30 C.F.R. § 56.11-1 alleged in Withdrawal Order 351863, issued May 1, 1979. (Exhibit 8).

5. The corporate operator has a history of seventeen paid violatio and the respondents have no previous violations (Exhibit 8, Tr. 47).

6. The violation alleged in Withdrawal Order No. 351863 was abated promptly and in good faith by the corporate operator. (Tr. 145, Exhibit 1).

7. At the time of the inspection on May 1, 1979, the MSHA inspecto observed and photographed an employee of the corporate operator walking the reject conveyor toward the head pulley with a grease gun in his hand (Tr. 25, Exhibit 7).

8. The conveyor is approximately 300 feet long and 30 to 40 feet above the surface of the ground. The conveyor belt itself is approximat 30 inches wide. (Tr. 71).

9. On the day of the inspection, May 1, 1979, the means of access provided to an employee in order to grease the head pulley of the convey belt was to either walk up the conveyor belt or to climb up the reject material which falls off the end of the conveyor and forms a pile on the ground. (Tr. 37).

10. The accumulation of rock material from the end of the conveyor builds in height until it is sufficiently high enough to allow an employee to walk up the refuse pile and grease the head pulley at the end of the conveyor belt. (Tr. 37).

11. In order to abate the withdrawal order for the alleged failure t provide a safe means of access to a working place, the employees of the corporate operator lowered the elevated grease fittings to a safe lubricating location. (Exhibit 2).

12. On February 5, 1979, at another gravel pit owned by the corporat operator and located in the State of Washington, an employee was injured, after greasing the head pulley on the elevated end of a conveyor, when his foot slipped on the conveyor belt and he fell approximately 15 feet into a sand pile. The conveyor was protected with a walkway and railing. (Exhibi 6).

ISSUES:

1. On May 1, 1979, did the corporate operator fail to provide and maintain a safe means of access to the working area, thus violating 30 C.F.R. § 56.11-1 as alleged in the withdrawal order?

2. If so, did the respondents knowingly authorize, order, or carry ou such violation within the meaning of section 110(c) of the Act?

DISCUSSION:

Respondent Ben Leiler made admissions which go to the unsafeness of the access to the head pulley and also go to his knowledge of unsafeness. He stated to the inspector that it was very "taboo" to grease conveyors in the manner being used, but that they did not have the manpower to install greasing locations. (Tr. 39). At the time of the inspection, he also stated to the inspector that a few months prior to the inspection on May 1 1979, an employee had been injured at their other plant when he fell approximately 15 feet into a sand pile from a conveyor belt while greasing the head pulley. That conveyor was equipped with a walkway and railing, but the conveyor observed by the inspector on May 1, 1979, was not so equipped.

There were two options mentioned as access open to employees who were maintaining and greasing the head pulley and any other parts connected wit the conveyor. One was the method observed by the MSHA inspector, with the employee walking up the conveyor, and the other method was to climb up the reject pile at the end of the conveyor after the pile was of sufficien height.

Witnesses for the respondents gave the opinion that it was safe to climb the reject pile in order to service the head pulley. However, even if this were true, if there is no reject pile at the time, the only means of access would be for an employee to walk up the conveyor belt.

nd that he had intended to correct the situation by lowering the grease ittings to ground level. This was his intention after the employee fell rom the conveyor belt several months earlier, and was injured. The reason iven for the failure to install the lowered fittings was a lack of time, ince all available men were on production. It is significant that there re other reasons why an employee might have to climb up the reject pile ther than to grease the head pulley. Rollers have to be changed eriodically on the conveyor and a motor or the V-belt drives might have to e changed.

Under the circumstances, there was no consistent and safe means of ccess to the work area provided by the corporate operator. According to he employee who was observed walking up the conveyor belt, this was a egular method of access to the area which was to be greased. Thus, the etitioner has shown by a preponderance of the evidence that a safe means f access to the working area was not maintained and provided and that here was a violation of 30 C.F.R. § 56.11-1.

The next question was whether or not respondents knowingly uthorized, ordered, and carried out such violation within the meaning of ection 110(c) of the Act.

The Commission has found that Congress did not intend that "knowingly" hould be synonymous with "willfully". It has also supported a judge's inding that "knowingly" as used here means "knowing or having reason to now". Secretary of Labor, Mine Safety and Health Administration v. Kenny ichardson, BARB 78-600-P, (Jan. 19, 1981).

Respondent Ben Leiler, by his own admissions, knew that access to a orking place by walking up the conveyor belt was unsafe or hazardous prior o the date of the inspection on May 1, 1979. He told the MSHA inspector hat he had wanted to move all grease locations down to ground level ince the earlier experience of the employee falling off of the conveyor elt. However, no changes were made until after the withdrawal order was ssued on May 1, 1979. By the following day, the work of lowering the rease fittings was accomplished. Thus, no action was taken until an MSHA nspector happened along and observed the violation taking place. I onclude from his own admission that respondent Ben Leiler knew or had eason to know of the continuing violation on or before May 1, 1979, and, s superintendent for the corporate operator, that he did nothing about it. ccordingly, he violated section 110(c) of the Act as alleged by etitioner.

The evidence does not show that respondent Frank L. Miles knew or had eason to know that a safe means of access was not provided and maintained o the working place on or before May 1, 1979, that being the date that the ithdrawal order was issued and the cited regulation was violated. There

been aware of the fact that employees were walking up the conveyor b
to grease the head pulley, but this evidence is neither conclusive n
substantial.

CONCLUSIONS:

1. The undersigned Administrative Law Judge has jurisdiction o
parties and the subject matter.

2. The Miles Sand & Gravel Company is a corporation and on May
1979, it violated 30 C.F.R. § 56.11-1 as alleged in Withdrawal Orde
351863 in failing to provide and maintain a safe means of access to
working place.

3. Respondent Ben Lieler violated section 110(c) of the Act as
alleged in the complaint of the petitioner.

4. Petitioner has failed to prove that respondent Frank L. Mil
violated section 110(c) of the Act as alleged.

ORDER

The petition filed in DOCKET NO. WEST 80-332-M, Frank L. Miles,
respondent is hereby dismissed. In DOCKET No. WEST 80-333-M, Respon
Ben Leiler is found to have violated section 110(c) of the Act and i
ordered to pay a penalty assessment of $250.00 within 30 days of the
of this decision.

Jon D. Boltz
Administrative Law Judge

Distribution:

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Mr. Ben Leiler, Plant Superintendent, Miles Sand & Gravel Company,
P. O. Box 130, Auburn, Washington 98002

	)	02-00150-05003
	)	
KENNECOTT COPPER CORPORATION, AND	)	MINE: Kennecott Ray
M. M. SUNDT CONSTRUCTION COMPANY,	)	
	)	
RESPONDENTS.	)	

DECISION

APPEARANCES:

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Marvin A. Husted, Vice President
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for the respondents

Before: Judge John J. Morris

STATEMENT OF THE CASE

In this case the Secretary of Labor on behalf of the Mine Safety and Health Administration (MSHA) seeks an order affirming certain citations and assessing civil penalties. The contest arises under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq.(1977).

Pursuant to notice, a hearing was held in Phoenix, Arizona on April 1980. At that time MSHA and Kennecott were the only parties to this action. At the hearing, Kennecott indicated its desire to withdraw its notice of contest of citation nos. 377273, 377270, 377269, and 377268. They admitted the violations occurred and agreed that the penalties proposed were reasonable.

MSHA moved to dismiss citation nos. 377272 and 377267. In support thereof, the Secretary stated that there was insufficient evidence to pro these alleged violations.

The Secretary and Kennecott submitted a stipulation of facts as to t remaining citation nos. 377265 and 377266. The occurrence of the alleged violations was not disputed. Respondent contested these citations on the ground that the violations were the responsibility of M. M. Sundt Construction Company (Sundt), an independent contractor. Kennecott also argued that if it were held liable for these violations it should not be found to have been negligent because it had no control over the job site where the violations occurred.

Subsequent to this hearing, MSHA adopted regulations establishing a method for citing independent contractors. As a result of these regulations, the Federal Mine Safety and Health Review Commission in Secretary v. Pittsburgh and Midway Coal, BARB 79-307-P et. al. (1980) gav the Secretary the opportunity to decide whether to continue pursuing the existing action against the owner-operator or to proceed against the independent contractor claimed to have violated the standards.

In light of the regulations and the P & M decision, I issued an orde directing the parties to state their positions with respect to these rece developments. Kennecott responded by restating its contention that Sundt was solely responsible for the violations. It requested that the citatio be vacated. The Secretary chose to continue the proceedings against Kennecott unless Sundt agreed to voluntarily substitute itself as the respondent with respect to the two citations in question.

On November 10, 1980, Kennecott submitted a motion to substitute Sun for itself with respect to citation nos. 377265 and 377266. Sundt indicated its agreement to this proposal. Sundt stated that it would withdraw the notice of contest as to these citations if the penalties wer recomputed to reflect the amount which would have been assessed if the citations had been issued originally to Sundt. Sundt contended that the penalty should be based on its company size and history of violations rather than on Kennecott's.

Sundt was subsequently joined as a party in this case, but only as t citation nos. 377265 and 377266. On May 4, 1981, the Secretary and Sundt filed a motion proposing penalties based on Sundt's size, history of violations and prompt good faith abatement of each violation.

ORDER

Pursuant to 29 C.F.R. 2700.11 Kennecott's notice of contest as to citations nos. 377273, 377270, 377269 and 377268 is withdrawn. These citations are affirmed. After reviewing the criteria for the assessmer a penalty, I also affirm the proposed penalty for each of these citatic set forth below.

Citation No.	377273	$195.00
Citation No.	377270	122.00
Citation No.	377269	150.00
Citation No.	377268	130.00

Kennecott is directed to pay these penalties within 30 days of the date this order.

Pursuant to 29 C.F.R. 2700.11, MSHA's motion to dismiss citation r 377272 and 377267 is granted. These citations and their proposed penal are vacated.

Further, pursuant to 29 C.F.R. 2700.11, Sundt's notice of contest as citation nos. 377265 and 377266 is withdrawn. These citations are affirmed. After reviewing the criteria for assessment of a penalty, I a affirm the proposed penalty for each of these citations as set forth below.

Citation No.	377265	$90.00
Citation No.	377266	65.00

Sundt is to pay these penalties within 30 days of the date of this orde

John J. Morris
Administrative Law Judge

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MAY 14 19

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF DIANNE MEULLER, Complainants	:	Complaint of Discrimination
	:	Docket No. WEST 81-99-DM
	:	Aaron Crescent Valley Mine
v.	:	
AARON MINING, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Linda R. Bytof, Attorney, U.S. Department of Labor, Sa Francisco, California, for the complainants; Bruce T. Esquire, Reno, Nevada, for the respondent.

Before: Judge Koutras

Statement of the Case

This is a discrimination proceeding initiated by the complainar against the respondent pursuant to section 105(c)(1) of the Federal Safety and Health Act of 1977, charging the respondent with unlawful discrimination against the complainant Dianne Meuller for exercising certain rights afforded her under the Act. The matter was initially scheduled for hearing in Reno, Nevada on March 17, 1981, but the mat was continued at the request of both parties. A further continuance was granted when the parties advised me of a proposed settlement dis of the controversy.

Discussion

On May 4, 1981, MSHA filed a motion to dismiss, complainant's consent, and the settlement agreement. In support of the motion to dismiss, MSHA states as follows:

1. On May 4, 1981, Dianne Meuller and Respondent Aaron Mining, Inc. entered into a settlement agreement resolving the issu raised by Complainant's discrimination complaint.

2. By the terms of the agreement, Complainant, Dianne Meuller, agreed to withdraw her discrimination complaint filed with Mine Safety and Health Review Administration on May 23, 198

and delivery of the agreement.

2. Respondent further agrees to expunge from Ms. Meuller's personnel records any and all reference to the circumstances relating to the subject complaint of discrimination.

3. Insofar as Respondent currently is not engaged in the operation of any mine within the State of Nevada, Respondent cannot reinstate Ms. Meuller to her former job as a blaster. However, if during the twelve (12) month period subsequent to the date of execution of the agreement by Respondent, Respondent commence to operate any mine within the State of Nevada, and directly employs at said mine individuals with duties similar to that of a blaster, Respondent further agrees to offer Ms. Meuller employment in said mine in any job with the same or similar duties and at the same rate of pay she was earning at the date of her termination from the Aaron Crescent Valley Mine.

4. Complainant, Dianne Meuller, agrees to withdraw the subject complaint of discrimination filed with the Mine Safety and Health Administration on May 23, 1980 and hereby authorizes the Secretar of Labor to dismiss the complaint filed with the Federal Mine Safety and Health Review Commission on her behalf.

5. Upon execution of the Settlement Agreement, the payment of $6,300.00, and the expungement of her personnel records, as aforesaid, Complainant agrees to and hereby releases Aaron Mining Inc. from any and all liability arising out of her termination from Aaron Mining, Inc. on April 24, 1980, which is the subject of her Complaint referred to herein.

MSHA has submitted a copy of a consent statement executed by Ms. Meul on May 4, 1981, which verifies that she voluntarily withdrew her complaint and entered into the settlement agreement with respondent. Under the circumstances, I see no reason why the motion should not be granted.

ORDER

In view of the foregoing, the proposed settlement disposition of this matter is APPROVED and the Complainant's motion to dismiss is GRANTED.

George A. Koutras
George A. Koutras
Administrative Law Judge

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MAY 14 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEVA 80-658
	:	A.O. No. 46-02724-03010H
v.	:	No. 1 Surface Mine
ISLAND CREEK COAL CO., Respondent	:	

DECISION

Appearances: James P. Kilcoyne, Jr., Attorney, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner; Marshall S. Peace, Esquire, Lexington, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding filed by the petitioner against the respondent pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), proposing a civil penalty assessment for one alleged violation of mandatory safety standard 30 CFR 77.1607(b). The alleged violation was served on the respondent on September 5, 1979, through the issuance of citation no. 0648106, a section 107(a) imminent danger order issued by MSHA Inspector Sherman L. Slaughter. The condition or practice described by the inspector on the face of the order is as follows:

> The elevated inclined roadway over which four 120 ton rock trucks were hauling spoil material from the shovel to the valley fill at the Mill Creek No. 3 pit was slipping because it was raining hard and the road was covered with mud. The rock trucks were sliding sideways when they came down the roadway and had to raise their beds for more traction going up the roadway. Even with the beds raised the trucks were spinning their way up the incline. The roadway did not have adequate berms on its outer banks which was elevated more than 100 feet above the hollow. The rock truck drivers did not have full control of the trucks while coming down the roadway to the fill

get injured, possibly fatally, if the trucks continued to haul over this roadway in the above condition and it is reasonable to expect this could happen before the rain stops and/or the condition is corrected.

Respondent filed an answer to the proposal for assessment of civil penalty and denied the existence of the alleged violation. Respondent asserted that it followed the inspector's directions in its desire to cooperate with him, but denied that the conditions described constituted a violation of the Act or regulations.

A hearing was convened at Charleston, West Virginia, on March 3, 19 and the parties appeared and participated fully therein. The parties were afforded an opportunity to file post-hearing briefs, and the argume presented herein have been fully considered by me in the course of this decision.

Issues

The principal issues presented in this proceeding are: (1) whether respondent has violated the provisions of the Act and implementing regulation as alleged in the proposal for assessment of civil penalty filed in this proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violatio based upon the criteria set forth in section 110(i) of the Act.

In determining the amount of a civil penalty assessment, section 110 of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator' ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achiev rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 6-8):

1. No. 1 Surface Mine is owned and operated by Island Creek Coal Company.

subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The administrative law judge has jurisdiction over this proceeding pursuant to Section 105 of the 1977 Act.

4. The inspector who issued the subject citation was a duly authorized representative of the Secretary of Labor.

5. A true and correct copy of the subject order was properly served upon the operator in accordance with Section 104(a) of the 1977 Act.

6. Copies of the subject order, modification and termination are authentic and may be admitted into evidence for the purpose of establishi their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

7. The alleged violation was abated after a withdrawal order was issued.

8. Island Creek Coal Company is a large operator within the meaning of the Act and assessment of a civil penalty in these proceedings will not adversely affect the operator's ability to continue in business.

Testimony and Evidence Adduced by the Petitioner

William Hamrick, safety engineer, International Safety Division, United Mine Workers of America, testified that on September 5, 1979, he visited Island Creek's No. 1 Surface Mine in order to inspect the roadway at the Mill Creek job site. He concluded that the haul road was slippery because it was raining continuously, and he noticed trucks slipping and sliding due to the mud on the embankment and on the incline. He determined that the truck operators did not have full control of their vehicles, and he observed the 120-ton Webco trucks going up the hill with their beds raised in order to get the back wheels in traction. He testified that he told mine superintendent L. A. Moses that the weather conditions were too bad to operate on the road.

Mr. Hamrick stated that only one area of the roadway was repaired prior to the arrival of the MSHA inspector. This was not on the road incline, but in a location near the shovel. Mr. Hamrick and truck driver Jim Humphrey drove over to the road with Inspector Slaughter and they pointed out to him that there were no berms on either side of the road incline. Mr. Hamrick explained that the lefthand side of the uphill road dropped 50-60 feet to a coal pit and the right side dropped about 100 feet. Mr. Hamrick believed that the weather conditions could cause the trucks to collide, and that the lack of rocks on the berms would not keep the trucks from going over the steep embankment.

Mr. Hamrick stayed at the mine throughout the day, periodically visiting the roadway to inspect conditions. He observed trucks hauling dry material down the road to the valley fill. He stayed at the property until about 3:15 or 3:30 and he noted that it was still raining at this time (Tr. 13-21).

On cross-examination, Mr. Hamrick conceded that he had never operated any of the large Webco trucks. He described the descent of the fully loaded trucks down the road incline as follows (Tr. 24-25):

> Well, when they approach the steep incline, 'cause I was standing, you know, looking up at the trucks and I could tell the trucks were sliding, the operator, you know, in his steering, and I guess in his braking, the trucks would slide back. You know, I'd say, approximately, sideways for 20 feet. They'd catch, go to the other side, same way, I'd say a distance 15 to 20 feet.

In response to bench questioning, Mr. Hamrick stated that he talked with several of the truck drivers on the day in question, and while two of them acknowledged that they were slipping, they still felt that they had full control of their vehicles. Another driver felt that the road conditions were too dangerous, that he did not have full control of his vehicle, and he withdrew his truck from the roadway (Tr. 26-29).

In response to further questions, Mr. Hamrick indicated that he had had problems with the road in question on previous occasions A citation had been issued previously on April 27, 1979, for lack of berms on the roadway and for slippery road conditions. His recommendation for keeping the roadway in question safe included packing hard material, such as shale, on the road, which would hold longer and have a good grip for traction (Tr. 145-146).

MSHA Inspector Sherman Slaughter, testified that he visited No. 1 Surface Mine on September 5, 1979, after receiving a request to do so from Mr. Hamrick. He arrived at approximately 11:15 or 11:30 a.m., and met with Mr. Humphrey, Mr. Moses, Mr. Chapman, and Mr. Hamrick.

Using a sketch of the haul road and adjacent area, exhibit P-1, Mr. Slaughter demonstrated the physical layout of the haul road and discussed his observations of the road conditions on September 5. He stated that it was raining and the roads were slick. Trucks were hauling spoil materials, a fine, grainy-like sandstone material, and spreading it on the road. Other loads of material were being transported down to the valley fill area. Thirty feet beneath the lefthand side of the road was a coal pit and 100 feet below the right side was the valley fill. He noted that there were inadequate berms on either side of the road for which he later issued a citation at 11:45 a.m.

haul road, Mr. Slaughter drove to the valley fill area, and periodicall he would return to the haul road to check whether the conditions had worsened. At 4:50 p.m., he decided that it was necessary to issue an imminent-danger order for a violation of section 77.1607(b), and in order to keep the trucks from using the roadway because of the slipping conditions.

Mr. Slaughter believes that section 77.1607(b) requires a truck operator to maintain full control of his equipment at all times. He determined that the operators in this instance were not in control beca he saw one truck going up the hill with its bed up, and it could only partially go up the roadway because of the muddy, slick conditions. He noted that when the trucks attempted to brake, they would slide sideway Since the berms were inadequate, he was concerned that the trucks could slide toward the valley fill which was a 100 foot drop over the side of the roadway.

Mr. Slaughter explained that rocking the road had helped for awhil but the continual rain had caused the road to become slick again. He determined that the respondent was negligent in that it should have stop the hauling earlier. He noted that it was raining all day and both Superintendent Moses and the mine foreman were near the haul road throughout the day. He felt that there was a danger of a fatal injury if a truck went over the embankment (Tr. 29-45).

On cross-examination, Mr. Slaughter testified that the operator ha stopped rocking the road about 12:30 or 1 o'clock. Because it continue to rain, he did not suggest that they continue to rock the road, and he conceded that he did not tell management to cease their production runs because it was not raining hard and the trucks were still getting traction. About 3 o'clock, conditions begain to worsen, which led him to issue an imminent-danger order. He felt that since the truck driver did not have full control of their vehicles, they could possibly have lost control entirely and gone through any berm at the side of the road (Tr. 45-65).

On redirect examination, Mr. Slaughter testified that since the road was wet, muddy, and slick, there was a detrimental effect on the truck driver's ability to keep his truck under control, and in his view respondent should have stopped production and use of the road prior to the time he issued the order (Tr. 65-67).

In response to bench questioning, Mr. Slaughter admitted that if the operator had continued rocking the road, keeping it dry enough to maintain traction, he may not have issued the order. He indicated that the violation was eventually abated by the use of a grader, which skimmed off the slick material on the road's surface, and he terminated the order once the trucks were able to get traction on the road (Tr. 40-41, 67-76).

In response to further questions, Mr. Slaughter stated that he was not aware of prior complaints about the road's conditions. He had never issued any citations on the road in the past (Tr. 93-96, 126-129, 138-139).

James L. Humphrey, mobil equipment operator, and chairman of the Mine Safety Committee, testified as to the factors which led him to withdraw his truck from operation on September 5, 1979. He stated that it had been raining, causing the road to become slick and he was having difficulty in maintaining full control of his vehicle. He also felt that the top of the hill was too soft and muddy, and the lack of berms made it unsafe to drive on the road. Once he withdrew himself, he discussed the matter with mine foreman, Ed Allen, and then called Mr. Hamrick at approximately 10:30. Thereafter, MSHA Inspector Slaughter arrived, but prior to his arrival, Mr. Humphrey stated that he observed two or three trucks still driving on the slick haul road. He testified that rocking the road works for a certain period of time, but if it continues to rain, the sandstone material breaks up, and the road becomes slick again (Tr. 78-87).

On cross-examination, Mr. Humphrey testified that two or three other truck operators did not withdraw themselves on the day in question. He admitted that his own truck had some mechanical defects, in that the tires were worn, but he did not complain to mine management about the condition of his tires (Tr. 87-90).

In response to bench questioning, Mr. Humphrey indicated that mine management did not object to his withdrawing himself from the roadway in question, and he went back to work the next day after the road passed inspection (Tr. 90-93). Mr. Humphrey explained the extent of previous complaints about the road which had been brought to the attentio of management. He stated that any time it rained or if the ground froze and thawed, the conditions presented an imminent danger. He felt that it is a mine foreman's duty to conduct a preshift examination and warn the miners of any danger before they begin to work. He believed that the problem could have been solved if the respondent had begun plowing the road at 6:30 a.m. and put gravel on it. He felt that a hard rock, such as limestone, should be used (Tr. 139-145).

Testimony and Evidence Adduced by the Respondent

L. A. Moses, mine superintendent, testified that he had been at the mine and had observed the truck hauling prior to Mr. Humphrey's complaint. He had already ordered the shovel operator to put sandy, coarse material on the road. Using the sketch, (exhibit P-1), Mr. Moses explained what was being done to the road. On the upper inclined portion, dry material was dumped and spread with a dozer. The trucks would turn in the shovel area, back down the grade, and dump their loads. This process continued for approximately 700 to 800 feet, where the trucks would turn around, and Mr. Moses testified that the trucks

The work on the road continued all day and the truck operators were never instructed to stop placing material on the road surface. Mr. Moses stated that no trucks had ever run off the edge or into a berm and they had never had any injuries or accidents on the road (Tr. 103-110).

On cross-examination, Mr. Moses admitted that he was not at the haul road between 3 and 5 o'clock but was working in another mine area. However, he indicated that he was in communication with the second shift foreman by means of a radio. He stated that it was normal for a truck to slip and slide as it proceeded down a wet road. He did not consider the road to be unsafe and he never heard any of the truck operators claim that it was (Tr. 110-114).

In response to bench questioning, Mr. Moses stated that the company policy was to either rip up the road or put dry material on it if they found it to be slippery. It is the responsibility of a foreman, who stays on the scene, to determine whether or not there are problems with road conditions. He admitted that on the day in question it had been raining and the roads were slippery. He explained that just after Mr. Humphrey had taken himself off the job, they decided to do something about the road. Prior to the time that the imminent danger order was issued, they had never shut the haul road down completely because of wheather conditions. It was the first time they had to shut down for a full shift (Tr. 120-124).

Findings and Conclusions

Fact of violation

Citation No. 0648106, issued by Inspector Slaughter on September 5, 1979, is an imminent danger order issued pursuant to section 107(a) of the Act. The order cites a violation of mandatory safety standard 30 CFR 77.1607(b), which states as follows: "Mobile equipment operators shall have full control of the equipment while it is in motion."

The fact that the inspector found that the conditions cited amounted to an imminent danger is not controlling as to the question of whether those conditions may serve to establish a violation of section 77.1607(b) It seems obvious to me from the conditions described by the inspector on the face of the order, as well as his testimony at the hearing, that he believed the trucks which he observed using the haulroad in question were not being kept under full control by the drivers while coming down the inclined portion of the road, and while attempting to negotiate the incline in the opposite direction. The inspector's conclusions in this regard were based on his observations of trucks sliding sideways as they came down the incline, as well as their spinning and sliding even with their beds lowered to provide traction on the rain-slicked roadway. Therefore, the critical question presented is whether the evidence and testimony adduced in this case supports the petitioner's contention that the trucks in question were not being maintained under full control by the operators.

the testimony of the inspector who observed at least two of respondent's trucks on the elevated haul road in question. One of the trucks was slipping and sliding while attempting to negotiate up the elevated incline with its bed raised for traction. Another loaded truck was coming down the incline and was slipping sideways as it traversed the slippery roadway. In both instances, the roadway was extremely wet due to a rather constant rainfall during the entire day in question, and even though respondent was attempting to keep the roadway dry by "rocking" the roadway, there came a point in time during the shift when the inspecto believed that the truck drivers were unable to maintain full control of their trucks as required by section 77.1607(b). Petitioner points out that one of the drivers, James Humphrey, testified that he withdrew himsel from driving a truck on the day in question because he could not maintain full control of the vehicle due to the slippery conditions of the raodway. Petitioner further asserted that respondent's witness did not deny that he observed vehicles slipping and sliding during the day in question, and argues that the respondent presented no evidence that on a normal operatir day trucks slip and slide while operating on the incline in question, and drop their truck beds in an attempt to keep the vehicles under control. In summary, petitioner maintains that its evidence supports a finding that trucks do not normally slip and slide while operating on the haulroad in question, and that the slipping and sliding of the trucks on the day in question is a certain indication that the operators did not have full control of the vehicles while they were in motion.

Respondent argues that since there were no accidents, injuries, or trucks sliding into berms on the haul road in question on the day the citation issued no inference can be made that the trucks were not under the full control of the drivers. Although the inspector spoke to some of the drivers at the beginning of the second shift, there is no evidence that he discussed the road conditions with them immediately before decidir to issue the imminent danger order. Since the inspector was present and had been periodically checking the road all day, respondent asserts that until the order was issued the drivers must have had full control of their trucks since the inspector issued no earlier violations. Further, respondent points out that the condition which presented any hazard was the slick haul road caused by continuing rain, and the fact that the drivers were trying different techniques to gain traction does not indicate that they did not have full control of the trucks. Conceding that an accident, collision, or a complete spin-out could establish a lack of full control of the trucks by the drivers, absent any competent testimony by any of the drivers, respondent maintains that the opinion testimony of the inspector should be given little weight in establishing a violation.

After careful consideration of the arguments presented, I conclude that the petitioner has the better part of the argument. Respondent's assertion that an accident or near-miss has to occur before a violation is established is rejected. I find that the testimony of the inspector, coupled with the testimony of UMWA representative Hamrick, who also

driver who withdrew himself and testified that he was experiencing difficulty in maintaining control of his vehicle due to the slick road conditions, establishes a violation of the cited standard by a prepondera of the evidence. In addition, even though respondent's witness Moses believed that slipping and sliding on a wet road was normal, I believe it is reasonable to conclude that since the respondent was attempting to improve the road conditions by hauling and spreading dry materials on the inclined portion of the roadway, it did so out of recognition that trucks were having difficulty negotiating the roadway. It seems to me that if the respondent really believed that slipping and sliding was normal, it would not have gone to such great measures to dump and spread dry materials on the roadway. Under the circumstances, I conclude and find that the trucks which were attempting to traverse the roadway in question were not under the full control of the drivers, and the citat is AFFIRMED.

History of prior violations

Respondent's history of prior violations is reflected in exhibit P-4, a computer print-out detailing 25 prior paid citations by the respondent for the period September 5, 1977, through September 5, 1979, through September 4, 1979. I take note of the fact that there are no prior citations of section 77.1607(b), and based on the size and scope of respondent's mining operation, I cannot conclude that its history of prior violations is such as to warrant any increase in the civil penal assessed by me in this matter.

Size of business and effect of penalty on the respondent's ability to continue in business.

The parties stipulated that the respondent is a large operator and that an assessment of a civil penalty for the violation in question will not adversely affect respondent's ability to remain in business. I adopt this stipulation as my finding on this issue.

Good faith compliance

The record reflects that abatement was achieved after a withdrawal order was issued and the parties so stipulated. Although respondent may have been taking steps to improve the conditions of the roadway during the rain, its rocking became fruitless when it became evident that the rain would not stop, and only after the issuance of the order was abatement achieved. Abatement was achieved by stopping operations until the condition of the roadway improved. Under the circumstances, respondent had no choice but to cease operations and it did so at the inspector's insistence. Accordingly, I cannot conclude that respondent should be unduly rewarded for any abatement efforts which came about as a result of a withdrawal order.

Petitioner argues that the violation is very serious in that the inspector issued an imminent danger order because he believed a driver could be seriously injured before the rain stopped or before the respondent could correct the hazardous road conditions. In support of its argument, petitioner points to the fact that the roadway in question was elevated more than 100 feet above the valley fill below, that the berms may have been inadequate to prevent a truck from going over the embankment, and that if a truck did go over, it was reasonable to expect a serious injury. Aside from its argument that no accident or injuries occurred, respondent advances no additional arguments concerning the gravity of the citation.

After careful consideration of the arguments presented on this issue, and taking into account the fact that the road conditions were slippery and dangerous, a truck operating at the elevated incline some 100 feet above the valley below, would be placed in a hazardous and precarious position were it to slip and slide toward the embankment while loaded and travelling down the incline. The same could be said for a truck coming in the opposite direction attempting to negotiate the hill with its bed down. Under the circumstances, petitioner's arguments are well taken, and I conclude and find that the violation is serious.

Negligence

Conceding that the respondent attempted to correct the condition which caused the citation by rocking the roadway in question, petitioner nonetheless argues that the respondent failed to exercise reasonable care in correcting the condition which caused the violation. The condition which caused the violation was the failure of the truck driver's to maintai full control of their vehicles. The reason they could not fully control their vehicles was the fact that the steady rain was obviously washing away the dry materials that respondent was dumping on the roadway, and the road conditions eventually deteriorated to a point where the inspector believed that allowing operations to continue any further would result in serious injuries. At that point in time, he issued his closure order and use of the roadway ceased. Petitioner's argument suggests that the respondent should have voluntarily closed the roadway down and ceased all operations until the rain stopped. By failing to do this, petitioner argues that respondent was negligent since it has the ultimate responsibili to enforce safe working practices and procedures. Coupled with the fact that respondent was previously informed that the elevated roadway is hazardous when in a wet and slippery condition, the fact that mine management was present and aware of the conditions of the roadway on the day the citation issued, and the fact that it ceased to rock the road prior to the issuance of the citation, petitioner argues that respondent exhibited in high degree of negligence.

Petitioner does not assert that respondent is guilty of gross negligen Based on all of the evidence adduced in this case, I cannot conclude that the respondent exhibited a reckless or deliberate disregard for the safety of the drivers by failing to close the roadway down before the order

haulroad is ipso facto always hazardous and dangerous, then it should take steps to shut down the roadway at the mine in question whenever it rains. On the facts presented in this case, it seems to me that the respondent was attempting to correct the road conditions by rocking the roadway with dry materials to improve traction. Although the mine superintendent was absent from the roadway location at the time the orde issued, he testified that he was in communication with a foreman by mean of a radio, and since none of the drivers complained, he did not believe the roadway was dangerous. However, he conceded that he became concerne and decided to do something about the road at the time Mr. Humphrey withdrew himself. Under the circumstances, I cannot conclude that mine management did nothing about the roadway conditions, nor can I conclude that it simply chose to ignore the conditions.

With regard to respondent's asserted prior knowledge of the conditi of the roadway, I take note of the fact that Mr. Hamrick's testimony suggests a difference of opinion as to how to correct any slippery conditions, and Mr. Hamrick indicated that some of the prior complaints dealt with lack of sufficient berms rather than trucks operating out of control. Further, Inspector Slaughter testified that he was not awar of any prior complaints about the road conditions, and petitioner's prior history of violations does not include any repeat violations of section 77.1607(b). Under the circumstances, I cannot conclude that the record supports a finding that respondent makes it a practice to totally ignore slippery road conditions on the haulroad in question, and makes it a practice to ignore such conditions.

Finally, I take note of the fact that the inspector who finally issued the closure order did so after he concluded that continued operat would probably result in an accident or injury. Up until that point in time, the inspector was periodically checking the conditions of the roadway, and even though he stated that the respondent ceased rocking the roadway at approximately 12:30 or 1:00 p.m., he did not advise the respondent to continue with the rocking operation since it was obvious that it was doing no further good to provide traction. He conceded that he did not at that time advise mine management to stop using the road because it was not raining hard and trucks were still able to maint some traction, and at approximately 3:00 p.m., he believed that conditio had deteriorated to the point where he felt obliged to issue a closure order. Therefore, since the inspector who was on the scene took no action earlier than 3:00 p.m., to either issue a citation or a closure order, I believe it was reasonable for mine management to conclude that the roadway conditions were not such as to preclude the vehicle operators from maintaining full control of their trucks.

In view of the foregoing, I conclude that the violation resulted from the respondent's failure to exercise reasonable care to cease operations at the time the order issued, and that this failure on its part amounts to ordinary negligence.

Penalty Assessment and Order

On the basis of the foregoing findings and conclusions, and takin into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty in the amount of $1,500 is reasonable an appropriate for the citation which has been affirmed, and respondent IS ORDERED to pay the assessed penalty within thirty (30) days of the of this decision and order.

George A. Koutras
Administrative Law Judge

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MAY 15 1981

ECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 80-131
Petitioner	:	A.O. No. 40-02577-03001
v.	:	
	:	Daysville Tipple
NITED MINERALS,	:	
Respondent	:	

DECISION

Appearances: Carole M. Fernandez, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for petitioner;
N. F. Tankersley, United Minerals, Crossville, Tennessee, for respondent.

Before: Judge Koutras

Statement of the Proceeding

This civil penalty proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with three alleged violations of mandatory safety standards. Respondent filed a timely answer and a hearing was held on March 10, 1981, in Knoxville, Tennessee. Upon the completion of testimony and oral arguments, the parties were given the opportunity of submitting posthearing briefs, and both parties filed written arguments on May 4, 1981, and they have been considered in the course of this decision.

Issues

The principal issues in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalties filed, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., Pub. L. 95-164.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Section 3(h) of the 1977 Act.

4. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 5):

1. At the time the citations were issued, the tipple was a new faci which had just started production, and it had no prior history of violati

2. The tipple processes approximately 40,000 tons of coal annually is a small operation.

3. Assuming the citations in question are affirmed, any civil penal imposed will not adversely affect respondent's ability to remain in busin

Jurisdictional Question

Respondent argues that its tipple is not a coal mine subject to the regulations under Part 77 of Title 30, Code of Federal Regulations, and t mandatory standards contained therein. It maintains that its only regula tory authority is OSHA. As support for this defense, respondent raises four arguments, a discussion of which follows.

Respondent first points out that it is not required to have a mining permit from either the State or Federal Governments, and that it has no written contracts with any mining operations to load coal. Next, respondent refers to the Mine Safety and Health Act of 1977, section 3, part 2, and concludes that its tipple operation does not come within the scope of the definition for a coal mine. It maintains that the words "custom coal preparation facilities" refers only to activities conducted on, or proces plants located at, a particular coal mine. Since its tipple is not on th mine premises, it is not subject to the Act or its regulations. Finally, respondent examines the legislative history of the Act and asserts that t dangers which Congress sought to prevent in implementing the Act are not those associated with a coal tipple. Therefore, respondent maintains it should not be subject to the regulations under the Act.

Respondent's second defense refers to several cases issued by the Department of the Interior's Office of Hearings and Appeals. One such case Western Engineering v. Office of Surface Mining, 1 IBSMA 202 (1979), held that Western's river terminal was not subject to the regulations under the Surface Mining Control and Reclamation Act of 1977 since the ambiguity of the definition for a surface coal mine made it unclear whether the Act was intended to cover Western's operations. By analogy, respondent argues that the definition for a coal mine under the Mine Safety and Health Act is equally as ambiguous and should not be applied to its tipple operation.

As a third defense, respondent appeals to the Commission's sense of economic justice to support its position on this jurisdictional question. From respondent's perspective, the costs and benefits of regulating tipples do not warrant their being subject to the Mine Safety and Health Act.

In its pleadings, respondent asserts that it is not a bituminous, anth cite or lignite coal mine, but rather, a tipple which crushes and loads coa the bulk of which comes from 35 to 84 miles away, with most of it going to the Department of Energy at Oak Ridge, Tennessee.

In addition to the assertions made by the respondent in its pleadings and brief filed in this matter, the testimony of the witnesses reflects tha respondent owns several tipples, one of which has been regularly inspected and regulated by MSHA for 2 or 3 years, and that respondent has a number of customers for whom it processes coal at its tipple. This process includes the crushing, cleaning, and sizing of coal which is brought to the tipple. Respondent concedes that while some of the coal is from intrastate customer the tipple also processes coal which crosses state lines (Tr. 139, 140).

Petitioner argues that respondent is subject to the jurisdiction of th Act in that respondent's tipple is a "coal or other mine" within the meanin of section 4 of the Act, 30 U.S.C. § 803, the products of which enter comme or the operations of products which affect commerce. In support of its pos tion, petitioner distinguishes those cases cited by respondent, issued by t Board of Surface Mining Appeals, pointing to the different concerns of that agency and the Federal Mine Safety and Health Administration. Petitioner argues that the definition of a coal mine under the Mine Safety and Health Act includes Respondent's tipple. Finally, respondent refers to Marshall v Stoudt's Ferry Preparation Company, 602 F.2d 589 (3rd Cir. 1979), cert. denied, NA 79-614 (January 7, 1980), which it maintains supports its posi- tion that a tipple is subject to the provisions of the Act.

After a careful review and consideration of all of the jurisdictional arguments presented in this case, I conclude that the tipple in question is a mine within the meaning of that term as defined by the Act, and therefore is subject to MSHA's enforcement jurisdiction. Section 3(h)(1)(c) of the Act defines "coal or other mine" as "lands * * * on the surface or under- ground * * * used in, or to be used in, * * * the milling of such minerals, and includes custom coal preparation facilities."

The Dictionary of Mining, Mineral and Related Terms, Bureau o 1968 edition, page 859, defines the term "preparation plant" as in any facility where coal is "separated from its impurities, washed and loaded for shipment." The term "tipple" is defined at page 11

> Originally the place where the mine cars were tipped and emptied of their coal, and still used in that sense, although now more generally applied to the surface structures of a mine, including the preparation plant and loading tracks * * The dump; a cradle dump * * *. The tracks, trestles, screens etc., at the entrance to a colliery where coal is screened an loaded. [Emphasis supplied.]

In my recent decision, Harman Mining Corporation v. Secretary and UMWA, Docket Nos. VA 80-94-R through VA 80-97-R (January 2, 19 cluded that based on the testimony and evidence presented, there w tion that Harman's tipple preparation plant was in fact a "coal or mine." As the facts here do not warrant a different conclusion, m in Harman Mining is applicable.

In my prior decision, I noted that the legislative history of supports a broad interpretation of the Act's coverage requiring th be resolved in favor of the Mine Act's jurisdiction. The report o Senate Committee on Human Resources states:

> The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated unde this Act be given the broadest possible interpretation, and i is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep. No. 95-181, 95th Cong., 1st Sess. (May 16, 1977) at 14; Le History of the Mine Safety and Health Act, Committee Print at 602.

In Marshall v. Stoudt's Ferry Preparation Company, 602 F.2d 5 (1979), cert. denied, No. 79-614 (January 7, 1980), the Third Circ that "the work of preparing coal or other minerals is included wit Act whether or not extraction is also being performed by the opera Therefore, I cannot agree with respondent's assertions that the pl of the Act or the legislative history support a finding that its t which is not on the mine premises, is not subject to the Act or it regulations.

The cases cited by respondent under the Federal Surface Minin neither controlling or persuasive authority in deciding the instan dictional issue. By merely examining the definition of surface co operations in 30 C.F.R. § 700.5, it is obvious that its coverage i narrow than that provided by the definition of "coal or other mine

he Federal Mine Safety and Health Act. The definition of surface coal mini perations refers to "activities conducted on the surface of lands in connec ion with a coal mine." Such activities include processing or preparation o oal "at or near the mine site."

The definition of "surface coal mining operations" under the Surface ining Act, by using limiting clauses, restricts the coverage of that law o those processing plants that are "in connection with" or "at or near the ine site." The three cases cited by respondent concern themselves with efining the scope of these limiting clauses in determining the jurisdiction f that law. Specifically, Drummond Coal Company v. Office of Surface Minin 3SMA 80-56 (August 6, 1980), established a two-part test for coming within he definition of a surface coal mining facility. A plant must be "conducte n the surface or in connection with a surface coal mine," and secondly, it ust be located "at or near a coal mine." To satisfy these tests, a judge ust look to ownership of the facilities in question and the relative istances between the plant and the mine. No such analysis is required unde he Federal Mine Safety and Health Act of 1977. The definition of a "coal o ther mine" does not include limiting clauses which restrict coal preparatio acilities to those in connection with or near a coal mine. In the absence estrictive language, the Act encompasses all coal preparation facilities.

Although respondent raises various economic arguments against jurisdic- ion over its tipple, I cannot consider these matters in light of the plain eaning of the statute and its legislative history. Additionally, since espondent processes coal which crosses state lines, it operates a mine hose products affect commerce. See Andrus v. P-Burg Coal Company, Inc., 95 F. Supp. 82, 84 (S.D. Ind. 1980).

Testimony and Evidence

MSHA surface coal mine inspector, Lee Aslinger, confirmed that he visit he Daysville Tipple on June 2, 1980, as part of a regular construction site nspection. He stated that he had previously inspected the tipple on two ccasions prior to the time it went into full operation, and during the seco nspection, about 2 to 3 weeks before the tipple began to operate, he prepare list of potential violations and gave it to Mr. Tankersley, the owner of nited Minerals. Although it was just a representative sampling, he thought he list would be helpful to Mr. Tankersley. Three weeks later, Mr. Aslinge ade an official inspection at which time he issued the citations in questio Tr. 6-11). On cross-examination, Mr. Aslinger admitted that he had been nstructed by the respondent to prepare a list of everything required for co liance prior to the time the tipple went into operation and became energize Tr. 17).

In response to bench questions, Mr. Aslinger clarified the nature of hi nspections, and stated that in both February and May 1980, he inspected the onstruction site, at which time he was authorized to issue citations for vi ations in connection with health and safety during construction. Instead o ssuing citations, Mr. Aslinger gave the operator a list of potential viola- ions (Tr. 18-22).

Don A. McDaniel, MSHA coal mine electrical inspector, testifiec conducted an electrical inspection at the tipple in May 1980, althou tipple was not yet in operation. According to Mr. McDaniel's superv this was a courtesy inspection that had been requested by Mr. Tanker he noted that citations are not normally issued during courtesy insp Although he did not prepare a written list, he remembered showing a employee the violations his inspection had revealed. He could not r whether he had indicated the need for signs or fire extinguishers (T 77).

On cross-examination, Mr. McDaniel testified that none of the m employees had requested a list of the violations. Since the primary of his courtesy inspection was to check the electrical facilities ar look for potential fire hazards, he did not offer his opinion on the issue, and he sensed a lack of interest on the part of the operator no one accompanied him during his inspection (Tr. 82-84).

Respondent examined Steve Hastings, an employee at the Daysvill Mr. Hastings stated that Mr. Aslinger had been requested to give a c list of potential violations which he discovered during his courtesy tion, but Mr. Hastings was not aware of whether Mr. McDaniel had pro list of electrical violations (Tr. 95-101).

Citation No. 985423

This citation states that "the entire length of the conveyor wa visible from the starting switch and a positive audible or visible w system was not installed to warn persons that conveyors will be star

Inspector Aslinger confirmed that he issued the above citation June 12, 1980, because the conveyor belt was not equipped with an au alarm to warn others when it was being started. He explained that t operator is located in an electrical installation about 5 to 6 feet ground level. Since this facility is covered entirely with tin and no windows, it is impossible for the operator to know whether there employee doing work on the conveyor belt. He believed that an emplo is working on the equipment when the control switches are energized, suffer a permanent or fatal injury.

Although Mr. Aslinger observed no one working on the conveyor b saw grease guns and shovels in the area and concluded that employees been working on the belt at some earlier time. He also testified th Mr. Tankersley abated the violation by installing an audible alarm s within the 8-day compliance period (Tr. 6-17). On cross-examinatior Mr. Aslinger could not remember whether the conveyor belt had been s on the day the citation was issued (Tr. 17).

In response to bench questions, Mr. Aslinger stated that he cou remember discussing the requirement of an audible warning device at struction site inspections in February and May. He used a diagram t

the location of the electrical control station in relation to the conveyor belt, and stated that at the point where the on-off switch was located, the operator could not see what was going on at the conveyor belt. The control switches activated the five different belts in the tipple, and it was possi for all the conveyor belts to be energized at one time. He then stated tha although it only took two people to operate the conveyor and move the coal onto the belt, he had seen as many as four people around the belt at a give time. He testified that the operator abated the violation by installing a bell-type alarm which rang when the machine was started (Tr. 27-34, ALJ Exh. 1).

Steve Hastings testified that the standard procedure, before starting the conveyor belt, was to call out each man's name and wait for a response. Additionally, there were guards on the belt to keep people from getting hur (Tr. 97-98). Mr. Hastings stated that he had asked the inspector to explai the requirement of an audible alarm. He told the inspector about their method of calling out the names of each worker, but that the inspector was not satisfied that this method would work (Tr. 110-111).

Citation No. 985424

This citation states that "a suitable danger sign was not posted at th major electrical installation at this surface facility."

Inspector Aslinger confirmed that he issued this citation when he noticed that there was not a suitable danger sign posted at the major electrical installation facility. He was concerned that this presented a dange to both the employees and the people living in the family dwellings located within 100 yards of the facility. He had seen children playing near the homes nearby, and he noted that there was nothing to keep them out. Since there was no fence enclosing the area, intruders could come in and not be aware of the electrical hazards. He reasoned that this presented a danger of electrical shock. The building was not locked, and the only evidence of it being an electrical establishment was the wires entering it (Tr. 38-41). On cross-examination, the inspector admitted that the switchboxes have sign stating "Danger High Voltage" (Tr. 49).

Don McDaniel, testified that the tipple had a major electrical install tion which presented a danger because it was made of tin and contained switchboxes on one side. Although he did not remember observing a danger sign, he believed that one stating that the building contained energized power should be required (Tr. 77-78).

Steve Hastings testified that all electrical switchboxes have a tag on them stating their size and also a sign indicating the possible danger. He explained that the electrical building is locked whenever the tipple is clo and that only the employees are allowed in the facility when it is open. H had never seen any children playing around the tipple. Furthermore, he had received instructions requiring him to tell children and visitors to leave (Tr. 98-101).

Citation No. 985425

This citation states that "fire extinguishers were not provid permanent electrical installation at this surface facility."

Inspector Aslinger testified that he issued this citation bec were no fire extinguishers at the electrical installation. Since building had wooden floors and contained combustible materials, th visible fire extinguishers presented a danger. He noted that ther grease, lubricants, and coal dust present in the facility, and obs employees entering the building. He also maintained that Mr. Tank aware of the requirement, since 2-1/2 to 3 years earlier, he had i tion for the same violation at another tipple owned by Mr. Tankers present citation was abated by installing a fire extinguisher (Tr.

On cross-examination, Mr. Aslinger stated that he could not r listing the need for a fire extinguisher during his previous perso tions (Tr. 58-59). In response to bench questions, Mr. Aslinger t that he issued this citation based upon his observations of the fa needs. He noted that it took only one large fire extinguisher to violation (Tr. 61).

Don McDaniel testified that an inspector uses certain refere to determine the various standards and requirements for fire extin These books include definitions of potential fire hazards, and the instruct the inspector on the size and type required and the dista which the fire extinguisher should be located (Tr. 78-81). On cro examination, Mr. McDaniel indicated that the size and type of the extinguisher depended upon its distance from the electrical instal building (Tr. 84-85).

Steve Hastings testified that there was a fire extinguisher l the end loader which was usually parked within 20 feet from the el house. He stated that his instructions were to allow the building if it caught on fire. If someone was inside, however, he would tr them out of the building (Tr. 95-96). On cross-examination, Mr. H stated that there were three fire extinguishers within 20 feet of trical operation. He admitted that one was located on a service t was used during the day for running errands or picking up fuel. T two were on a portable drill and a front-end loader (Tr. 101-106). stated that the service truck usually stays in one place because i their tools. It is always parked in the same place and rarely lea site (Tr. 110).

In response to bench questions, Mr. Hastings could not rememb whether he told the inspector about the fire extinguisher on the s truck. He stated that he though that the standard required that t extinguisher be located in the building and not 20 feet away (Tr.

Upon recall, Mr. Aslinger testified that he observed the serv parked about 80 to 100 feet from the tipple's electrical facility,

front-end loader, about 150 to 200 feet from the electrical installation, picking up bumper rails in the woodland. At the time he issued the citati it was more than 20 feet from the electrical facility. The core drill was located about 250 to 300 feet from the building, and he observed no fire extinguisher within 20 feet of the electrical building (Tr. 116-120).

Findings and Conclusions

Fact of Violations

Citation No. 985423

30 C.F.R. § 77.1607 requires that "when the entire length of the con veyor is not visible from the starting switch, a positive audible or visib warning system shall be installed and operated to warn persons that the co veyor will be started."

Petitioner's evidence establishes that the electrical control station was 5 to 6 feet below ground level and that the operator controlling the switches in the station could not see whether someone was working on the conveyor belt. Although respondent's witness testified that the practice at the tipple was to call out each man's name before starting the conveyor belt, I find that this type of warning is inadequate. The safety standard requires that an audible or visible warning system be installed and respon dent offered no evidence that it had installed a proper system. According the citation is AFFIRMED.

Citation No. 985424

30 C.F.R. § 77.511 requires that "suitable danger signs shall be post at all major electrical installations."

The evidence and testimony presented establishes that there was not a suitable danger sign at the electrical facility. Testimony established th the electrical facility was made of tin and contained energized power, and the only warning of a possible danger were the tags on the switchboxes whi alerted the reader to the danger of high voltage. Upon considering the testimony of the inspector that there was no fence enclosing the facility and that the tipple was near a residential neighborhood, I find that the tags on the switchboxes were not a "suitable danger sign." Although respo dent's wintess stated that he had been instructed to keep all children and visitors off the tipple grounds, this statement of company policy is no defense to the violation, and the citation is AFFIRMED.

Citation No. 985425

30 C.F.R. § 77.1109(d) states that "fire extinguishers shall be provi at permanent electrical installations commensurate with the potential fire

National Fire Protection Association."

Testimony by the inspector revealed that the electrical building ha wooden floors and presented a potential fire hazard since it contained g lubricants and other combustible materials. Having found this testimony be credible, I also find that this type of facility requires that a fire extinguisher be available in both a permanent and accessible location. evidence disclosed that there were three fire extinguishers which were u located within 20 feet of the electrical operation, it was clear that th were not affixed in a permanent position. Respondent's witness indicate one was located on a service truck, another on a portable drill, and a t on a front-end loader. Since each of these machines is either mobile or portable, I must conclude that the machines containing the fire extingui could possibly move to an inaccessible distance from the electrical inst tion. Respondent's argument that the service truck had to stay in one p because it held the workers' tools was contradicted by the witness' stat that this same truck was used during the day for running errands or pick up fuel. I find, therefore, that a preponderance of the evidence indica that a fire extinguisher was not provided for the permanent electrical installation in question, and this citation is AFFIRMED.

Good Faith Compliance

I find that abatement of the above citations was achieved in good f within the time fixed and extended by the inspector. Petitioner indicat that the operator made a conscientious effort to achieve rapid complianc on two of the violations and should be given credit for its effort. I h considered this in assessing the civil penalties in this case.

Gravity

The lack of an audible warning device for the conveyor belt suggest possibility of serious injury if someone were working on the equipment w the control switches were energized. But since respondent offered evide of an alternative warning system in that each man's name was called befo the system was turned on, I find the seriousness of this violation to be somewhat mitigated. Additionally, although the inspector claimed to hav seen as many as four people around the belt at a given time, respondent' witness testified that there were guards on the belt which decreased the probability of harm. I conclude that this violation was nonserious.

I find that the absence of a sign warning of the danger at the majo electrical facility to be a nonserious violation. As noted by the inspe electrical wires entering the building were visible from the exterior of building. Most employees would be aware of the power contained in the building. Moreover, although the inspector observed children playing in the area outside the tipple grounds, testimony revealed that it was unli that they would be found in or around the facility. The electrical buil was locked when the tipple was closed and employees had been instructed

to electrical shock was not great.

I find that the absence of a fire extinguisher in or near the permanent ctrical installation was serious. I agree with petitioner's contention t there was a likelihood of injury to one or more persons if there were a den fire. Mitigating the seriousness of this violation is the evidence of ee fire extinguishers which were usually located near the building. The bability of a fire is reduced, thereby lessening the degree of gravity.

ligence

In evaluating the degree of negligence on the part of the operator, I e carefully considered the effect of the preoperation inspections con- ted in February and May of 1980. Inspector Aslinger admitted that he had n instructed to give a list of everything required for compliance prior the time the tipple went into operation. Mr. Hastings confirmed that this uest had been made. Electrical inspector McDaniel's testimony also indi- es that the operator attempted to comply with all safety requirements, he stated that he had been requested by Mr. Tankersley to make a courtesy pection in May of 1980. He could not recall whether he mentioned the need either signs or fire extinguishers. While Mr. McDaniel claimed that his mary purpose was to check the electrical facilities, it seems reasonable t he should have warned Mr. Tankersley of the need for signs indicating otential electrical danger or the need for a fire extinguisher where a e hazard existed.

Although an operator is presumed to know the law, I find that the opera- reasonably relied on the inspector's prepared list and Mr. McDaniel's rtesy inspection, and that the respondent was attempting to comply with law in that he requested these inspections and specifically asked for a t.

Weighing against a finding of no negligence based on reasonable reliance the fact that this operator had owned another tipple for some time. Inspec Aslinger testified that Mr. Tankersley should have been aware of the fire inguisher requirement since he issued a citation for the same violation at other tipple about 2 to 3 years earlier. Therefore, upon balancing the rator's past experience with his reasonable reliance on the courtesy pections, I find a low degree of negligence on the part of the respondent, conclude that they all resulted from ordinary negligence in that respon- t failed to exercise reasonable care to prevent the cited conditions.

tory of Prior Violations

The parties stipulated that this was a new operation and the operator no history of prior violations, and I have considered this fact in essing the civil penalties in this case.

In Business

The parties stipulated that the respondent is a small operator and any civil penalties imposed will not adversely affect respondent's abil remain in business. I adopt this as my finding on this issue.

Penalty Assessment

On the basis of the foregoing findings and conclusions, I find tha following penalties proposed by the petitioner are reasonable and appro and I adopt them as the civil penalties assessed by me as follows:

Citation No.	Date	30 C.F.R. Section	Penalty
985423	6/12/80	77.1607(bb)	$30
985424	6/12/80	77.511	14
985425	6/12/80	77.1109(d)	52

ORDER

Respondent is ORDERED to pay civil penalties in the amount of $96 the citations which have been affirmed in this case and payment is to b made to MSHA within thirty (30) days of the date of this decision and c Upon receipt of payment, this matter is DISMISSED.

George A. Koutras
Administrative Law Judge

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MAY 15 1981

CRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 80-121
Petitioner	:	A/O No. 01-00322-03044F
v.	:	
	:	Maxine Mine
ABAMA BY-PRODUCTS CORP.,	:	
Respondent	:	

DECISION

pearances: Murray A. Battles, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Petitioner, MSHA;
H. Thomas Wells, Jr., Esq., Cabaniss, Johnston, Gardner, Dumas and O'Neal, Birmingham, Alabama, for Respondent, Alabama By-Products Corporation.

fore: Judge Merlin

This case is a petition for the assessment of a civil penalty filed the Government against Alabama By-Products Corporation. A hearing s held on April 14, 1981.

At the hearing, the parties agreed to the following stipulations r. 4-5):

(1) The operator is the owner and operator of the subject mine.

(2) The operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

(3) I have jurisdiction over this case.

(4) The inspector who issued the subject citation was a duly authorized representative of the Secretary.

(5) A true and correct copy of the subject citation was served upon the operator.

(6) The alleged violation was abated in good faith.

(7) The imposition of a penalty will not affect the operator's ability to continue in business.

(9) Witnesses who testify are accepted generally as expert in coal mine health and safety.

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator (Tr. 9-165). At the conclusion of the taking of evidence, the parties waived the filing of written briefs and agreed to make oral argument and have a decisio rendered from the bench (Tr. 165). A decision was rendered from the bench setting forth findings, conclusions, and determinations with respect to the alleged violation (Tr. 183-187).

BENCH DECISION

This case is a petition for the assessment of a civil penal for an alleged violation of 30 C.F.R. 75.202, which provides in pertinent part as follows: "Loose roof and overhanging or loose faces and ribs shall be taken down or supported."

The essential facts are not in dispute. They are set forth in the MSHA Report of Investigation admitted into the record as Government Exhibit No. 2. The operator was engaged in retreat mining. The roof control plan and the pillar control plan were being complied with. The pillar being mined out was at the intersection of a "brushed" entry, which was 6-1/2 feet to 8 fee high and of a crosscut, which was low coal of about 3-1/2 feet. After the third cut had been started in the pillar, the ventila- tion man sounded an area to the right outby side of the continuo mining machine whereupon a piece of rock fell from that area on the cable of the continuous mining machine, knocking out the power from the machine (see the drawing in Government Exhibit No. 2). The operator then began removal of the fallen material.

At the hearing today, the parties have stipulated that in addition to the facts set forth in the Report of Investigation, the continuous miner operator after the first fall tested an area immediately inby and adjacent thereto and that this second area was sound. The second area was rib rock, which had a pro- nounced curvature. It was part rib, part roof, and part corner. However, shortly afterwards, this second area of rock also fell, killing the section electrician, who was standing beneath it. It is undisputed that the section foreman told the electrician and the other men not to go on that side of the continuous minin machine and that in so doing the electrician disobeyed orders which he had received only moments before.

MSHA's allegation of a violation is predicated upon the assertion that under the mandatory standard, the area of the second rock fall should have been taken down or supported.

has not contended at the hearing today that this rib rock was loose, although previously his answer to one of the operator's written interrogatories appears to be that the roof fell because it was loose. The Solicitor has maintained throughout that the area was overhanging and that therefore, under the mandatory standard, it should have been taken down or supported.

For present purposes, I assume that the rock rib is within the definition of the mandatory standard. The principle issue is whether under the circumstances presented this area was required to be taken down or supported in accordance with the mandatory standard. The section foreman's testimony that before the second area fell the operator tried to pry it down but was unsuccessful is uncontradicted and I accept it. MSHA's mining engineer testified that timbers could have been set under this rib rock. The operator's section foreman testified that he considered timbering and discussed it with the pin man. However, according to the section foreman, because of the curvature of the arch, timbers could not be set straight and therefore, would not serve as support. Moreover, the section foreman stated that if the area fell, the timbers themselves would create an additional hazard by throwing the rock even further with the timbers also being thrown. The section foreman's testimony was corroborated by that of the pin man. After much consideration of the matter, I accept the operator's evidence regarding timbering.

The section foreman also testified that he consulted with the pin man about roof bolting and that this, too, was not feasible because the bolter would be exposed under roof without canopy protection due to the curvature. I also accept this testimony.

Finally, the possibility was discussed that the rib rock could have been shot down. Both the section foreman and MSHA's engineer agreed that this approach created the danger that a great deal of rock, indeed much more than was intended, might come down. Also, the hole for such a shot would have to be drilled by an individual standing on the continuous mining machine and the powder would have to be put in the hole by an individual either standing on the machine or standing in an unprotected location.

In each of the foregoing instances, the proposed solution presents hazards equal to if not greater than those presented by the original condition. I conclude that 75.202 requires that loose roof and overhanging or loose faces and ribs be taken down or supported, where the taking down or support would not create greater hazards to life and limb than already exist. Here the risks presented by the proposed solutions are higher than those presented by the situation itself. The cure cannot be worse than the illness. Accordingly, I cannot find that a violation exists.

was lost. However, I cannot interpret the subject mandatory standa to impose more dangers to life and limb than would exist without it. I cannot interpret this mandatory standard to require the operator to do things which would jeopardize even more lives than the one that was lost. It may be that in view of the situation presented, the operator should have removed all personnel from the section forthwith. But this consideration does not fall within the stated mandatory standard which is all that is before me.

The petition is DISMISSED.

ORDER

The foregoing bench decision is hereby AFFIRMED.

The petition to assess a civil penalty in the above-captioned proceeding is DISMISSED.

Paul Merlin
Assistant Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 26 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),		Civil Penalty Proceedings
	Petitioner	Docket No. LAKE 80-336-M A.C. No. 11-01599-05005
v.		
		Docket No. LAKE 80-337-M
OZARK-MAHONING COMPANY,	Respondent	A.C. No. 11-01599-050061 Barnett Mine

DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S. Depar of Labor, Chicago, Illinois, for Petitioner;
M. L. Hahn, Safety and Industrial Relations Director, and Victor Evans, Superintendent of Mining, Ozark-Mahoning Co Rosiclare, Illinois, for Respondent.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

These proceedings were filed by the Secretary of Labor, Mine Safety Health Administration (hereinafter MSHA) under section 110(i) of the Fed Mine Safety and Health Act of 1977, 30 U.S.C.A. § 820(a), to assess civi penalties against Ozark-Mahoning Company for violations of mandatory sta dards. Upon completion of prehearing requirements, a hearing was held i Evansville, Indiana on February 25, 1981. MSHA Inspector Dennis Haeuber George W. Winters, and Louis English testified on behalf of MSHA. Frank Golden, Kenneth Clanton, and Tom Dowling testified on behalf of Ozark-Mahoning. Both parties filed posthearing briefs.

ISSUES

Whether Ozark-Mahoning violated the Act or regulations as charged b MSHA and, if so, the amount of the civil penalties which should be asse

APPLICABLE LAW

30 C.F.R. § 57.4-69 provides as follows: "Mandatory. Approved mi rescue apparatus shall be properly maintained for immediate use. The equipment shall be tested at least once a month and records kept of the tests."

and lines shall be worn when men work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered."

Section 110(i) of the Act, 30 U.S.C. § 820(i), provides in pertinent part as follows:

> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

STIPULATIONS

The parties stipulated the following:

1. The Federal Mine Safety and Health Review Commission has jurisdiction over this matter.

2. Ozark-Mahoning is a subsidiary of Pennwalt Corporation.

3. Ozark-Mahoning operates a mine called the Barnett Mine.

4. The Barnett Mine is located two miles west of the junction of Routes 146 and 34 in Rosiclare, Pope County, Illinois.

5. There are approximately fourteen (14) to seventeen (17) men employed at the Barnett Mine.

6. The annual hours worked are 35,000.

7. The parties have agreed that George Winters, an employee of Ozark-Mahoning, did suffer an accident on February 7, 1980, while working at the Barnett Mine.

8. An investigation of this accident was made on February 13 and 14, 1980, by Mine Safety and Health Administration Inspectors Jack Lester and Dennis Haeuber.

9. Citation No. 366117 was issued at the time of the inspection.

10. Barnett Mine is an underground mine.

11. Flourspar is the product mined.

12. Approximately ten (10) MSHA's were not operable at the Barnett ne at the time the citation was written.

MOTION TO APPROVE SETTLEMENT CONCERNING CITATION NO. 365457

At the commencement of the hearing, the parties moved for an order proving a settlement concerning Citation No. 365457. That citation allege e violation of 30 C.F.R. § 57.6-20(e) in that the metal door on the explo- ve's magazine was not electrically bonded to the existing ground rods. HA initially proposed a civil penalty in the amount of $26. The parties quested approval of a settlement of this violation in the amount of $15 cause the magazine was located in a remote area and if detonation were to cur, injury would have been improbable since no employees were exposed to jury. Considering the above statements and the criteria contained in ction 110(i) of the Act, the motion to approve this settlement in the ount of $15 is granted.

CITATION NO. 366115

Citation No. 366115 was issued on February 14, 1980, to Ozark-Mahoning r violation of 30 C.F.R. § 57.4-69. The citation alleged that records re not available to indicate any inspection or maintenance on the ten McCa lf-contained breathing apparatus kept at the mine and the last recorded spection of the devices was in 1972.

The evidence established that seven miners at the Barnett Mine were lled in 1971 due to exposure to hydrogen sulfide gas. The undisputed evi- ence established that at all times relevant to this proceeding, the Barnett ne was affiliated with a central mine rescue station and the mine was not equired to maintain its own rescue station. Ozark-Mahoning conceded that ie apparatus in question was not maintained or tested as required by the egulation and that there were no records of any tests.

MSHA asserts that because Ozark-Mahoning kept the mine rescue apparatus : its mine, it was required to maintain and test them and keep records of ie tests. MSHA further contends that the lack of maintenance could have esulted in the use of defective equipment in an emergency situation causing ie death of miners at the work site.

Ozark-Mahoning contends that since it was not required to maintain a ine rescue station at this mine, the storage of defective equipment does ot violate the Act or regulation. It further claims that the mere presence f the defective equipment did not present any hazard to the miners because ie defects in the equipment would be immediately evident to any trained erson who attempted to use it and, hence, the equipment would not have been sed.

I have considered the evidence and arguments of the parties. Although zark-Mahoning was not required to have the mine rescue equipment at the

Barnett Mine because of its affiliation with a central mine rescue station the fact that it elected to keep the 10 McCaa self-contained breathing apparatus at the mine imposed upon it the duty to maintain and test the equipment as required by 30 C.F.R. § 57.4-69. I find this situation to be analogous to the law of negligence where although a person has no duty to act, if he does act, he may be liable for any affirmative acts which make the situation worse. See Prosser, Law of Torts, § 54 (3d ed. 1964). In t instant matter, MSHA correctly asserts that the mere presence of defective equipment may result in additional deaths or injuries if such equipment is used in an emergency. In an emergency, persons untrained in the use of th apparatus might attempt to use it. Moreover, a miner's attempt to use the defective equipment may delay notification to the central mine rescue stat Hence, where a mine operator is not required to maintain its own mine resc station but chooses to keep mine rescue apparatus at its facility, such apparatus must be maintained and tested according to the requirements of 30 C.F.R. § 57.4-69. Accordingly, I find that Ozark-Mahoning's failure to maintain and test the 10 McCaa self-contained breathing apparatus violated 30 C.F.R. § 57.4-69.

CITATION NO. 366117

Citation No. 366117 was issued on February 14, 1980, to Ozark-Mahonin for violation of 30 C.F.R. § 57.15-5. The citation alleged that a lost ti accident occurred when a timberman fell 23 feet down an open manway and th no safety belt was provided.

The undisputed evidence shows that George Winters, a timberman, suffe a broken leg and other injuries on February 7, 1980, as a result of a 23 f fall through an open manway. Prior to the accident, Winters and two othe miners where attempting to land a set of timber being hoisted. Ozark-Mahoning's foreman, Kenneth Clanton, was present and operating the control of the slusher. After the timber, which was approximately 17 feet long an weighed about 300 pounds, had been hoisted, Winters walked over to a point 2 to 3 feet away from the uncovered 36 by 40 inch manway. The timber stru Winters in the leg and he fell through the open manway. Winters sustained serious injuries and has not returned to work.

MSHA asserts that Ozark-Mahoning violated 30 C.F.R. § 57.15-5 in that the operator permitted a miner to work at approximately 2 to 3 feet away f a 36 by 40 inch hole where there was a danger of falling. While the regul tion in issue requires the use of safety belts and lines when men work whe there is a danger of falling, no such safety belts or safety lines were provided.

Ozark-Mahoning contends that it did not violate the regulation becaus of the following: (1) Winters did not fall and there was no real danger of anyone falling; (2) the use of safety belts while timbering is not norm industry practice; (3) Winters placed himself in an unsafe position in vio lation of specific orders to the contrary; (4) MSHA cited the wrong regula tion in the citation.

a miner was standing approximately 2 to 3 feet away from an open manway measuring 36 by 40 inches. There was a drop of 23 feet from the manway t the surface below. Timber was being hoisted through the manway by use of slusher operated by the foreman. The foreman had an unobstructed view of the area. The timber swung and struck Winters causing him to fall or be knocked into the manway. No safety belts or safety lines were provided b Ozark-Mahoning.

The regulation requires the use of safety belts or safety lines "whe men work where there is a danger of falling." The evidence establishes t there is a danger of falling when a person is working 2 to 3 feet from a 36 by 40 inch opening and the surface is 23 feet below. Ozark-Mahoning's foreman and assistant mine foreman concluded that it was possible for any working 2 to 3 feet from such opening to loose his balance and fall throu the opening.

Whether Winters fell through the open manway or was struck by the ti and knocked into it is irrelevant to this proceeding. The fact is that h was working in close proximity to the opening and there was a real danger falling. Although Foreman Clanton had an unobstructed view of the area w operating the slusher, he took no action to remove Winters from the place where there was a danger of falling. Although Foreman Clanton contended he told Winters to stay out of the way of the timber, Winters could not recall such an instruction. At the hearing, it was evident that Winters a hearing problem and Foreman Clanton admitted that Winters had had troub hearing directions on prior occasions. The evidence on behalf of Ozark-Mahoning fails to establish that Winters' actions prior to this occurrenc were either an aberration or could not be prevented.

Ozark-Mahoning contends that the use of safety belts or lines is not industry practice, would not have prevented Winters' injuries, and would impracticable. Suffice it to say that safety belts or lines would not be required in timbering if all miners were positioned so that they were not danger of falling. However, where, as here, a miner is in a position whe he is in danger of falling, such a device must be furnished. The evidenc establishes that Ozark-Mahoning violated 30 C.F.R. § 57.15-5 as alleged b MSHA. While Ozark-Mahoning may also have been in violation of 30 C.F.R. § 57.16-9, which provides that men shall stay clear of suspended loads, i irrelevant to this proceeding since no violation of that standard was cha by MSHA.

ASSESSMENT OF CIVIL PENALTIES

In asessing a civil penalty, the six criteria set forth in section 110(i) of the Act shall be considered. As pertinent here, Ozark-Mahoning prior history of 14 violations in the previous 2 years is noted. The assessment of civil penalties herein will not affect the operator's abil to continue in business.

CITATION NO. 366115

Ozark-Mahoning did not abate the violation cited within the allowed. Subsequently, an order of withdrawal was issued to have apparatus removed from the mine.

In assessing the negligence of Ozark-Mahoning Company, it is that on May 19, 1978, Ozark-Mahoning was cited for a violation of identical regulation as established in Citation No. 366115 and pa civil penalty. Hence, Ozark-Mahoning knew or should have known o to maintain and test mine rescue apparatus and record those tests clude that Ozark-Mahoning is chargeable with ordinary negligence.

As noted above, Ozark-Mahoning was not required to have mine apparatus at this mine because it was affiliated with a central m station. However, the fact that it had such equipment in defecti could compound the hazard in the following ways: (1) The McCaas used in an emergency with possibly fatal results; and (2) false r the existence of the McCaas at the mine site might delay notifica central mine rescue station. I conclude that the gravity of this is serious.

Based upon all of the evidence of record and the criteria se section 110(i) of the Act, I conclude that a civil penalty of $40 imposed for the violation found to have occurred.

CITATION NO. 366117

Ozark-Mahoning demonstrated good faith compliance after noti the violation.

The accident involving George Winters occured in the presenc Mahoning's foreman, Kenneth Clanton. Foreman Clanton saw Winters position in close proximity to the open manway and took no action Winters from the position where he was in danger of falling or to Winters with a safety belt or line. Thus, Ozark-Mahoning is char ordinary negligence in connection with this citation.

While the potential injury arising out of a fall is very ser likelihood of this occurring is lessened by the fact that men do ordinarily work where they are exposed to the danger of falling. is usually covered. Here, it was open for the purpose of hoistin Moreover, even if Winters did not hear the instruction of his for should have been aware of the existence of the open manway when h the area. No other miner was exposed to this hazard. Considerin above factors, I conclude that the gravity of this violation was

Based upon all the evidence of record and the criteria set f section 110(i) of the Act, I conclude that a civil penalty of $1, be imposed for the violation found to have occurred.

EREFORE IT IS ORDERED that Respondent Ozark-Mahoning pay civil pen- within 30 days for the violations as follows:

tation No.	Regulation	Civil Penalty
365457	30 C.F.R. § 57.6-20(e)	$ 15.00
366115	30 C.F.R. § 57.4-69	$ 400.00
366117	30 C.F.R. § 57.15-5	$1,250.00

James A. Laurenson, Judge

ution Certified Mail:

fael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn St., Chicago, IL 60604

L. Hahn and Victor Evans, Ozark-Mahoning Company, Rosiclare, IL 62982

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MA

ASARCO, INC.,	:	Contest of Citations
Contestant	:	
	:	Docket No. SE 80-125-RM
v.	:	Citation No. 108670; 7/2
	:	
SECRETARY OF LABOR,	:	Docket No. SE 80-126-RM
MINE SAFETY AND HEALTH	:	Citation No. 108671; 7/2
ADMINISTRATION (MSHA),	:	
Respondent	:	New Market Mine Unit

DECISIONS

Appearances: William O. Hart, Esquire, New York, New York, fo
Contestant; Leo J. McGinn, Attorney, U.S. Depart
Labor, Arlington, Virginia, for the Respondent.

Before: Judge Koutras

Statement of the Case

These proceedings concern two consolidated contests filed
contestant pursuant to section 105(d) of the Federal Mine Safe
Health Act of 1977, challenging two section 104(a) citations s
on the contestant by an MSHA mine inspector on July 24, 1980,
the contestant for two alleged violations of the mandatory noi
set forth in 30 CFR 57.5-50(b). Contestant denied that it exc
the required noise level standards in question and asserted th
assuming that the cited noise levels exceeded the standards it
denies that the citations were "significant and substantial",
that feasible engineering or administrative controls exist to
the employee exposure to noise, and contests the length of tim
by the inspector for abatement of the citations.

Respondent MSHA filed a timely answer to the contests and
was convened in Knoxville, Tennessee on March 11, 1981, and th
appeared and participated therein. Post-hearing briefs were f
the parties and the arguments therein have been fully consider
in the course of these decisions.

Issues

The issues presented in these proceedings include the fol
(1) whether the conditions or practices cited by the inspector
face of the citations constituted violations of the cited mand

existed for the abatement of the asserted noise exposure levels described in the citations for the abatement of the citations; (3) whether the alleged violations were "significant and substantial" violations within the meaning of the Act; and (4) whether the citations were properly issued in accordance with the Act.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, effective March 9, 1978, 30 U.S.C. 801 et seq.

2. Mandatory standard 30 CFR 57.5-50, provides as follows:

> 56.5-50 Mandatory. (a) No employee shall be be permitted an exposure to noise in excess of that specified in the table below. Noise level measurements shall be made using a sound level meter meeting specifications for type 2 meters contained in American National Standards Institute (ANSI) Standard S1.4-1971. "General Purpose Sound Level Meters," approved April 27, 1971, which is hereby incorporated by reference and made a part hereof, or by a dosimeter with similar accuracy. This publication may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018, or may be examined in any Metal and Nonmetal Mine Health and Safety District or Subdistrict Office of the Mine Safety and Health Administration.
>
> PERMISSIBLE NOISE EXPOSURES
>
> | Duration per day, hours of exposure | Sound level dBA, slow response |
> |---|---|
> | 8 | 90 |
> | 6 | 92 |
> | 4 | 95 |
> | 3 | 97 |
> | 2 | 100 |
> | 1-1/2 | 102 |
> | 1 | 105 |
> | 1/2 | 110 |
> | 1/4 or less | 115 |
>
> No exposure shall exceed 115 dBA. Impact or impulsive noises shall not exceed 140 dB, peak sound pressure level.

of two or more periods of noise exposure at different levels, their combined effect shall be considered rather than the individual effect of each.

If the sum

$$(C_1/T_1) + (C_2/T_2) + \ldots (C_n/T_n)$$

exceeds unity, then the mixed exposure shall be considered to exceed the permissible exposure C_n indicates the total time of exposure at a specified noise level, and T_n indicates the total time of exposure permitted at that level. Interpolation between tabulated values may be determined by the following formula:

$$\log T = 6.322 - 0.0602 \text{ SL}$$

Where T is the time in hours and SL is the sould level in dBA.

(b) When employees' exposure exceeds that listed in the above table, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce exposure to within permissible levels, personal protection equipment shall be provided and used to reduce sound levels to within the levels of the table.

Discussion

Both of the citations in this proceeding were issued pursuant to section 104(a) of the Act on July 24, 1980, by MSHA Inspector Thurman E. Worth, and the conditions or practices which Mr. Worth believed were in violation of mandatory standard 30 CFR 57.5-50(b), are described on the face of the citations as follows:

Citation No. 108670 (Docket SE 80-125-RM)

The full-shift exposure to mixed noise levels of the secondary crusher operator exceeded unity (100%) by 2.46 times (246%) as measured with a dosimeter. This is equivalent to an 8-hour exposure to 96.5 dba. Personnel (sic) hearing protection was being worn. Recognized engineering noise controls for secondary crusher such as those listed in the attached document "Engineering Noise Controls Guidelines for Metal and Nonmetal Mine Inspectors," or other industry known controls were not being used and had not been tried by the mine operator.

The full-shift exposure to mixed noise levels of the Ball Mill operator exceeded unity (100%) by 2.01 times (201%) as measured with a dosimeter. This is equivalent to an 8-hour exposure to 95 dba. Personal hearing protection was being worn. Recognized engineering noise controls for Ball Mills such as those listed in the attached document "Engineering Noise Controls Guidelines for Metal and Nonmetal Mine Inspectors," or other industry known controls were not being used and had not been tried by the mine operator.

MSHA's Testimony and Evidence - Docket No. SE 125-RM

MSHA Inspector Thurmond E. Worth, testified that he had over 16 years experience in the mining industry before joining MSHA in 1976, including employment with ASARCO. He is currently employed as a heal inspector and stated that he was familiar with the mill in question, and had visited in on one occasion prior to his inspection of July 24 He described the building where the alleged noise violations took pla as a metal building built on a concrete floor, and he approximated th dimensions as 80 feet long, 40 feet wide, and some 25 to 30 feet high The interior walls and ceiling are of metal construction. The struct houses a primary screen, a secondary screen, three cone crushers, and belt conveyors. Stone which is mined from an underground mine is processed in the building after being transported from a surge pile b conveyor belts into the crusher where it is reduced to smaller partic processed through a secondary screen and there stored in bins accordi to product size. The building consists of three levels, and the sour of the noise in the building is from the primary and secondary screen as well as from the stone itself as it is transported and processed through the various chutes (Tr. 8-13).

Mr. Worth confirmed that he took his noise readings with instrun in the normal fashion and that the results indicated DBA readings of 9 The instrument readings were taken in the secondary crusher operator work area, and at the specific location where he performs the greate part of his work. He confirmed that it was essential to know where a operator is located during the day and what his work duties are in or to relate to the test results. Although other individuals may travel through the building, the operator is essentially alone in the build during the course of the work day and he is assighed there for his en eight-hour work shift.

Mr. Worth stated that based on his observations on the day he is the citation, the operator's duties entailed checking the primary sc and crushers to insure that they are operating properly, insuring tha the belts are functioning properly, and monitoring certain amp guages

of the guages is a continual process and the operator is positioned some ten feet away from the primary screen when this is done. The remaining equipment checks are conducted periodically while the operator makes his equipment inspection rounds, and while he is in transit to check the silo to insure that they are not full. He described the manner in which these inspections are conducted visually by the operator while walking around the various equipment locations inside the building as well as outside where several conveyor belts feeding the stone from the surge pile are located. He estimated that it would take an operator approximately 20 minutes to perform one complete inspection round of all of the equipme and upon completion of this round the operator would return and position himself on a "grease barrel" from where he would continue to monitor certain amp guages located approximately five feet from his seated position on the barrel. Mr. Worth estimated that the operator would remain at this location for approximately 45 minutes before beginning another inspection tour, and under normal operating conditions and absent any problems, the entire process would be repeated again every hour durin the shift. In summary, Mr. Worth estimated that the operator would be walking around for approximately 20 minutes during any hour observing the equipment, and would remain by the barrel observing guages for the remaining approximate 40 minutes of any hour (Tr. 13-19).

Mr. Worth testified that it was his opinion that feasible administra tive or engineering controls could be implemented to reduce the noise levels and bring the building into question into compliance with the cited noise standard, and he defined the term "feasible" as anything whic is "reasonably possible" (Tr. 19). He believed that the most obvious option available to mine management would be the installation of a soundproof booth which could be constructed from two-by-four's and plywoo and insulated inside with accoustical tile insulation. He indicated that he made these suggestions to mine management. The purpose of the booth would be to house the operator while he is at the location by the barrel monitoring the amp guages, and he could monitor the guages by simply looking out of a window enclosure from inside the booth. Another option would be to place the guages inside the booth, and he believed that the operator would still be able to observe the bigger part of his operation from inside the booth and that his visibility would be the same as if he were sitting on the barrel (Tr. 20-22).

Mr. Worth expressed his opinion that installing a booth and requirin the operator to stay in it while he is monitoring the amp guages would not in any way inhibit the performance of his job. He also expressed an opinion that placing the operator in a booth for approximately 40 minutes of each working shift hour would result in a reduction of his exposure to noise below 90 dba, and in support of his opinion testified as follows (Tr. 23-24):

> Q. Did you perform any calculations to arrive at that, or what would be the basis on which you would testify to that?
>
> A. The time span.

A. The time span inside the booth. He can be exposed to DBA for four hours. All right, that is half a shift. He uld spend, say, six hours in the booth, then that would cut s DBA reading down to below 90, so he would be in compliance.

Q. Now, is it your opinion that a soundbooth, then, would rk in this circumstance?

A. Yes, sir.

Q. Both from a health standpoint, and from a standpoint his being able to achieve his job?

A. Yes, sir.

Q. Let me ask you this --

JUDGE KOUTRAS: Mr. McGinn, he hasn't finished.

THE WITNESS: I've had experience with a cement plant that had almost identical equipment, and their operator was over exposed, and they put in a sound-proof booth. His exposure read 96 DBA. They put him in a booth, and now his DBA is less than 90.

MR. MCGINN:

Q. Was this approximately the same type situation at we have here?

A. Approximately, yes.

pages 25-26:

Q. So, it's your opinion, then, that the use of undbooths in this instance would reduce the DBA under e standard, is that right?

A. Yes, sir.

Q. Okay, now, you recommended the soundbooths, right?

A. Yes, sir.

Q. Is that -- was that based upon -- what was that inion based upon?

A. Past experience.

With respect to the feasibility of installing the type of so proof booth that he recommended, Mr. Worth's testimony is suppor his conclusion that the installation of the type of soundproof bo recommended by him is feasible is as follows (Tr. 24-25):

Q. Now, as to the matter of soundbooths being feasibl you have experience in inspecting other plants of the same type or similar type, is that correct?

A. Yes.

Q. For instance, what types of other plants do you inspect which would be essentially the same activity and same physical setup?

A. I have a cement plant. They don't have the floatat operation that ASARCO does, but essentially everything else is the same.

Q. Now, and you're aware of other plants of the industry -- do you have any knowledge of other plants throug out the industry which are faced with approximately the same situation, as far as noise goes? Are you aware of any other is this industry wide concern?

A. Not of floatation plants and this type thing, but our quarries have crushers, and screen houses, and they put their men in booths and have no problem with it whatsoever.

Q. Now, would it be your opinion that this soundbooth that we've been talking about, is a highly unusual or a fair normal practice throughout the industry in combating excessi noise?

A. It's a normal practice.

Q. Have you seen soundbooths installed in other plants

A. Yes.

Q. Could you name a few for us?

A. American Limestone has booths for their crusher ope General Portland Cement has booths for their ball mills and mill operators. Vulcan Materials have booths for their crus people. Nellie and Haden have booths for their crusher peop Nalley and Gibson, they have crusher booths for their operat Adams Stone, Jenkins, Kentucky, they have booths for their operators.

Q. Are all these soundbooths within this district or sub-district?

A. Yes, sir.

Q. Do you know -- are these readily available, these soundbooths, which you described?

A. You can buy them, or the easiest way would be to build one. They're not that expensive to build.

Q. Are they commercially available, is what I really mean, for the industry? Are there companies which produce accoustical soundbooths of this type?

A. Yes, sir, they are.

Mr. Worth testified that the costs for sound proof booths range om $300 to $4,000, depending on size and that it can be constructed previously described by him. As for alternative means of reducing noise levels, he stated "There's all kinds of insulating routes y can go in (sic) they want to", but he opted to recommend a booth ause he believed it would be the easiest and cheapest method of achieving pliance (Tr. 26).

In response to my questions as to the procedures he used for testing individual operator's noise exposure, Mr. Worth explained as follows . 29-33):

Q. How did you arrive at the equivalent -- you stated in your citation that this is an equivalent to an eight-hour exposure. That leads me to believe that someone could be tested for under eight hours and with a computation, you come up with an eight-hour equivalent.

A. Yes, sir.

Q. What is that?

A. We take a dosemeter reading and it reads out into a percentage and it's averaged out over eight hours. It records nothing less than 90 DBA. So at the end of eight hours, we have a chart that breaks the percentage down into an average of exposure for the eight-hour period.

Q. All right, let me ask you this now: you said you hung the dosemeter on the operator. What specifically -- did you attach it to his body physically?

A. Yes, sir, I put it in a pocket and the microphone on his shoulder.

Q. And you left?

A. Well, I was there on the property all day. I made periodic checks and sound level readings and this type thing.

Q. All right, so this thing is attached to this individual and then, theoretically, he's supposed to wear it for his entire shift?

A. Right.

Q. Which is an eight-hour shift?

A. Yes, sir.

Q. So I take it while he was doing what he has to do there as a crusher operator, monitoring, sitting on the barrel and wandering around the plant and doing his job, this piece of equipment is attached to his body?

A. Yes, sir.

Q. And you're doing whatever inspection work you had to do in the mine --

A. Yes, sir.

Q. -- and you would come back periodically?

A. Yes, sir.

Q. Would you take readings? What would you do when you'd come back?

A. I'd check to see if he was having any problems wearing his equipment and take sound level readings.

Q. What if this fellow takes it off and stashes it somewhere while you're gone and puts it back on again, how do you know that?

A. Well, I wouldn't have any way of knowing it unless I caught him on a -- on a check as I come through.

Q. Is there any way that -- are there any procedures for monitoring this device while you're off doing your other inspecti duties?

A. No, sir.

device off and stashed it somewhere while you were gone, what would -- how would that affect it? What I'm trying to arrive at-- at what point in time during an eight-hour shift do you check the dosemeter for a noise reading and how do you arrive at 96.5 DBA out there? How many times do you look at this device over an eight-hour period?

A. We only check it, read it out, at the end of a shift but we visually -- visibly check it to see that he still has it on and this type thing.

Q. Okay. You also indicated that the noise sources were from the falling stone, screen and the crusher; is that correct?

A. Yes, sir.

Q. Are there any other sources of noise in this particular building where this individual is stationed?

A. No, sir.

Q. How do you determine the different noise levels from the stone and the crusher or from the screen or does it make any difference? What type of noise are you monitoring in that building? Are you monitoring the falling stone, the conveyor belts, the crushers or are you just monitoring all noises or a combination?

A. We're monitoring all noise that he's exposed to.

Q. All noise?

A. Yes, sir.

* * * *

In response to further questions from MSHA's counsel, Mr. Worth stated that he had never before tested the crusher operator in question, and he indicated that he explained the purpose of the dosemeter to him. Mr. Worth could not recall whether the operator advised him that he had previously been tested and asked him no questions. The operator did not explain his duties to Mr. Worth, and Mr. Worth reiterated that his opinion as to what those duties are is "based on experience and his job classification" (Tr. 35). Mr. Worth indicated that the duties of a secondary crusher operator in a mill such as the one in question would be essentially the same for each day. In response to questions as to how often he would return during a normal sampling cycle on a shift, Mr. Worth stated (Tr. 36-38):

do you return at different times furing the shift; is that correct

A. Yes, sir.

Q. Approximately how often do you return during a normal sampling procedure?

A. Usually we try to get back once an hour if possible.

Q. Do you recall in this instance how often you got back?

A. No, sir, I don't.

Q. What do you do when you come back, for noise now? What did you do in this instance when you came back?

A. I checked him to see that the microphone was still in the right place and he still had it on his person.

Q. When you come back, do you also take sound level measurements?

A. Yes, sir, I do.

Q. What's the purpose of that?

A. That's to check and be sure that I have the right exposure of percentages on my dosemeter whenever I read it out. It's to keep check on the dosemeter.

Q. How do you take your sound level readings?

A. I just have a sound level meter and hold it out at arm's length and take a reading off of it every -- up to 120 DBA's.

Q. Now, can you state specifically about how many times you came back to check on the equipment during this shift?

A. Not specifically, no, sir, I can't.

Q. Do you recall the different areas in which you met him to take your reading and to check your equipment?

A. Yes, sir, I met him at -- in his work area which is where he sit and monitored the amp guages and then I saw him going to the silos as I was coming over to the building to check on him again during the day. I saw him out on the outside on a walkway going to the surge tunnel and his checks of his equipment during the day.

from him; is that correct?

A. Yes.

Q. Did you have any conversation with him at that time?

A. No, sir. I told him that I appreciated him wearing it for me. Thanked him.

Q. Did he indicate there was anything abnormal in his work activities that day?

A. No, sir, he didn't.

Q. Again, the question really is about your estimation about the time involved in these various tasks. Again, you testified earlier that you estimated it to be about 20 minutes per hour of him walking around and about 40 minutes of an hour sitting in one area stationary, checking and monitoring the electrical --

A. Yes, sir.

Q. Do you still stand by that?

A. I do.

Q. Again, what is your basis for that time frame?

A. Well, observing the job that he has to do. Barring trouble, he just physically walks around and checks the conveyor belts and then sits and monitors the amp guages.

Q. So in your opinion, knowing his job classification, is the monitoring or the walking around inspection the more primary, more essential time of his tasks?

A. Monitoring his amp guages to keep from burning up a 50 hoursepower motor.

Q. So would there be greater danger in his being away from the monitoring position than at other times or --

A. Oh, sure, sure, because you never know when a crusher is going to stop up or a motor is going to short out or what.

Q. What does he do if such a situation should occur?

A. He shuts the equipment down.

Q. What is the purpose of shutting it down immediately?

A. So it won't do further damage to the motor or crusher or the other equipment that's involved.

On cross-examination, Mr. Worth conceded that he was not with the crusher operator during the entire eight hour shift for which he was tested, and the reason that he was not was that he had to make other inspection rounds through the mills. He stated that he was at the location in question "off and on, periodically, all day", and he determined that an inspection round by the crusher operator took approximately 20 minutes through actual observation and he explained this by stating "I could observe him from my rounds going through the plant". He testified as follows in support of his conclusion concerning this issue (Tr. 27-28):

Q. Is this from discussing it with the employee or your actual observation?

A. Actual observation.

Q. How long were you there at a given time? Were you there for an hour at any time?

A. Oh, it would vary. I might be there 30 minutes. I may be there an hour, may be there two hours.

Q. But you didn't conduct a time study or anything? I mean, in other words, it was just kind of hit and miss so far as what the employee was doing?

A. I had a dosemeter on him which is run for eight hours.

Q. Right, but as far as what the employee was doing as far as making rounds or sitting around, you're really speculating; are you not?

A. Well, observing him and his work habits. That's what I observed.

Q. But you weren't there for eight hours?

A. No, but --

Q. I'm just saying you've kind of made a categorical stateme that you think he made rounds for 25 minutes every hour and I was wondering how you concluded that if you were there and off at various times.

A. Well, knowing the job, I estimated the time and -- and I feel it's a reasonable time.

know the job?

A. I visibly observed what his job was as he went through his procedure.

Q. But you were there and then off elsewhere at various times?

A. Yes.

Q. So it was very much an estimate?

A. Yes, sir.

Mr. Worth testified further that he was aware of the fact that e of the mines mentioned by him as having sound booths installed, namely erican Limestone, is a subsidiary of ASARCO (Tr. 29). He confirmed at while he tries to go back to check on an operator once every hour ring a testing cycle, he did not know whether he did that in this case d did not know whether he was present for an hour at any given time precisely how long he would have been present since he did not time mself. His conclusions concerning the time spent by the crusher erator on various tasks are based on what he believed to be his job sks and through his personal observations, which he conceded were never en for an hour (Tr. 39). He further explained his position as follows r. 39-41):

Q. Well, I'm just wondering how you can come up with a conclusion that the man sits still for 40 minutes and walks for 20 minutes if you weren't there for even an hour at any given time or you don't even know if you were. How does one conclude that?

A. Based on his job that he had to do.

Q. And how do you know what his job is?

A. Because I observed him doing it.

Q. But never even for an hour at any given time as far as you know?

A. No.

Q. And it's your testimony that as far as you understand, his job of monitoring the guages is the most important aspect of his job?

A. In my opinion, it would be.

Q. And your opinion is based on what?

Q. Experience in a mill like this?

A. No, I have no experience -- experience in mills. have experience in inspecting in every operation that we h their primary job is to monitor amp guages so they won't b overload their motors and burn them up.

Q. Do you know sitting where he does, do you know if see the ore bins?

A. No, he can't see where they're pouring on.

Q. Can he see the feeders under the surge pile?

A. No, sir.

Q. Can he see the conveyor belts on the east and the side?

A. He can see part of it, but he can't see all of it

Q. Can he see the ore transfer chute on the east sid of the building?

A. I don't know.

Docket No. SE 80-126-RM

Inspector Worth confirmed that he issued citation no. 1086 described the building where the Ball Mill operator was working described the procedures and equipment utilized in the processi materials in the building. He stated that there is one operato in the building, that he put the noise measuring device on him 7:11 a.m., and left to conduct additional inspections. He retu periodically during the day but could not recall how often. He indicated that he usually tries to get back once every hour. M stated that he took sound level readings, and on his return obs operator at different places in the building such as the walkin the ball mills, taking samples at the location where the mills out the ground material, and standing next to a control panel. that he was "not that familiar" with the duties and functions o ball mill operator, but arrived at his conclusions concerning t duties by observing him taking samples and monitoring the amp g a seat or box which he sits on. However, Mr. Worth could not r whether he ever observed the operator seated, and he was of the that the operator can position himself in such a way as to faci the monitoring of the amp guages as well as keeping an eye on t

often this was done, but estimated that one sample an hour would be taken by the operator, and that this would take about five minutes, and he indicated that the operator would have no reason to go outside of the building (Tr. 43-50).

Inspector Worth testified that he believed it was feasible to redu the noise levels and that he recommended the installation of a sound-booth. Based on his understanding of the duties of the operator throug his observations, he believed that the operator could perform his dutie of checking and monitoring of the guages and the belts from inside a soundbooth, and that this would reduce his noise exposure to well below 90 dba's. He also indicated that he recommended the use of a soundboot to mine management, and was told that their employees could not work in booths. Mr. Worth also indicated that other mine operators have use soundbooths, that they were readily available and moderately inexpensiv and that they have been recommended to him during his training or in reading literature on the subject (Tr. 50-52).

On cross-examination, Mr. Worth conceded that he was "not that fam with the duties of a ball mill operator, that he could not recall wheth the operator was ever seated during his observations, and that his prev testimony that the operator took materials samples once every hour was an assumption on his part. He also conceded that he did not speak with the operator himself to determine what his duties were, and he (Worth) could not recall whether he was ever present observing the operator for as much as an hour at any one time, nor could he recall how often he returned from his other inspection rounds to actually observe the ba mill operator makes his rounds (Tr. 52-54).

Inspector Worth concluded his direct testimony as follows (Tr. 54)

Q. With all that lack of knowledge, you nevertheless concluded how often he could sit at that given seat and stay in a given place rather than move around and perform his job?

A. No, I didn't stay with him.

Q. You really don't know?

A. No, sir, I don't know.

MR. HART: I have no further questions.

JUDGE KOUTRAS: Do you have anything further, Mr. McGinn?

MR. MCGINN: No.

In response to questions from the bench, Inspector Worth testified that the operators in question were wearing Dupont dosemeters during h

while the ball mill operator was wearing an ACU-FIT earplug. However, he stated that he had no way of knowing how effective these devices were in terms of reducing any existing noise levels (Tr. 55). He stated that the contestant has never tried any other industry known noise controls other than earplugs, that he did not discuss the use of booths with the two individual employee operators who were cited, and that they made no comments concerning the effectiveness of the earplugs other than it was company policy that they be worn. He could not recall any complaints by the employees with respect to the use of the earplugs, and while he alluded to the fact that a mine operator was required to test its own employees for exposure to noise, he did not know how often this was done and stated "we really don't enforce it that heavy" (Tr. 56). He reiterated that the contestant's position was that its employees could not work in control booths (Tr. 57-58).

Inspector Worth testified that there was no way to sample an employee wearing plugs to determine whether he was in compliance with the noise exposure levels while wearing the plugs. As long as a mine operator has done all that he could in terms of administrative or engineering controls, he would not issue citations for noncompliance as long as the earplugs are worn (Tr. 61).

James Gardy, MSHA Health Specialist, testified as to his background and experience in mining, and stated that his present duties are those of a health inspector in underground mines and the crushed stone industry. He stated that he was familiar with contestant's mining operation and that he has inspected similar mills and crushers. With regard to his familiarity with the job classifications of a secondary crusher operator and ball mill operator, he stated that he was "vaguely familiar with those classifications" but "couldn't go into detail as to exactly what they do" (Tr. 66). Based on his experience and knowledge of operations similar to those of the contestant, Mr. Gardy was of the opinion that soundbooths are a feasible way for reducing the noise level dba's (Tr. 6). Booths may be constructed from inexpensive building materials and they are also available for purchase commercially throughout the industry. He believed that reductions in noise levels could be achieved below 90 dba's if a person remained in a booth for just two hours out of an eight hour shift. The longer one remained in the booth, more significant reduction in noise levels would result. He later stated that "I'd have to run calculations, but I would say they would probably reduce it to 90 or below" (Tr. 69).

Mr. Gardy testified that he has observed noise booths installed in a plant similar to that of the contestant's and named several of those plants in Kentucky and Tennessee. However, he qualified his testimony in this regard as follows (Tr. 69):

> Now, I'm speaking about primary crusher operators where a guy is stationary. He doesn't have to move around too much.

Q. So is it your testimony then that use of the sound control booth is your basic, primary -- in other words, is that what you would look at before you would look at anything else?

A. Well, if the man was stationary. If he didn't move around a lot. If his one job is in this one area the biggest part of the day, that is usually the answer.

Mr. Gardy was of the opinion that feasible controls are availab to reduce noise levels, and as examples he referred to building barr or enclosing the machinery. He also stated that it would depend on t particular situation and also stated "I'm not familiar with the one Mr. Worth testified about" (Tr. 70). He also believed that the use earplugs is a temporary measure and that proper hearing conservation programs are the best methods at solving noise problems. Based on t testimony presented concerning the citations in question, he was of opinion that the type of controls available would likely bring about compliance in these cases (Tr. 72).

On cross-examination, Mr. Gardy testified that he was not aware of any mills such as those operated by the contestant that have soun installed, and he indicated as follows (Tr. 72):

Q. You cited a number of companies that have installed similar to this and as I picked it up, most of them were stone type operations. Do you know of a single operation -- for lack of a better name, I'm talking about a metal type mill that has one of these things installed?

A. No.

Q. You don't know?

A. I can't specify a single company that's got a mill like yours because I'm not familiar with your mill. I don't know exactly what you have out there, but I am familiar with crushers and conveyor belts and screens.

And, at pages 74-75:

Q. (By Mr. Hart) So basically, but you do not know of a metal type mill that's installed one of these; you're talking about a quarry type situation, is that correct?

A. Quarries and the underground mines I've inspected out West, yes, all over.

Q. You've never seen the mill we're discussing?

A. No, sir, I haven't.

Q. You testified just vaguely that there are other types of engineering controls such as barricades, enclosures, etcert

A. Yes.

Q. How could you testify to the feasibility of that in a mill you've never seen? I mean, you really don't know what

A. Well, I've seen other, other mills where they put curtains, lead shield curtains between the noise source and the employee. I've seen where they've enclosed the machinery completely.

Q. Aren't all mills different?

A. To what extent?

Q. I mean, can you just sit there and come up with general engineering types things and say it would solve the problem --

A. For noise, yes, sir.

Q. -- and say it would apply?

A. Yes, sir.

Q. You can say that?

A. yes, sir.

Q. For noise. Do you have an engineering degree?

A. No, sir, I don't.

Q. You're not an industrial engineer?

A. I'm not an expert, no.

Q. You were talking about whether we had an audiometric program of sorts. Are you aware that we have an industrial hygiene department of 40 industrial hygienists in the company?

A. Here at the Knoxville operation?

Q. In Salt Lake, but it operates for all --

Q. You don't know whether we have an audiogram department?

A. *No, sir, I do not.*

Mr. Gardy believed that with the use of a soundbooth, placing an ndividual in it for two hours during a shift would lower the dba exposure o 90 or below. However, he conceded that he had made no calculations o support this conclusion (Tr. 76).

Contestant's Testimony and Evidence

Samuel D. Lawrence, Assistant Mill Superintendent, testified that he s a graduate engineer with a degree in mineral process engineering from he Montana School of Mines, and that he has worked in various mills hroughout the United States. His responsibilities at the mill in question nclude maintenance and metallurgical controls and he is faimilar with he job functions of the two mill operators who were cited by MSHA in hese proceedings. In his opinion, they cannot perform their job in a oundbooth (Tr. 83-85). He described the duties of the secondary crusher perator, and they include the checking of meters, chute blockage or amage, damaged screens, extraneous materials in the product being rocessed, etc. In his view, if the operator were sitting in a sound- ooth, by the time any damage or problem was detected, the system would ave to be shut down for repairs. Mr. Lawrence believed that the operator as to be mobile in order to perform his functions because his job is ne that requires him to be moving the majority of his time to visually nd physically inspect all of the machine components, namely, three rushers and two screens. In addition, the operator is also responsible or cleaning up any spillage each shift. The monitoring of the guages s critical during the start-up phase of the operation, but once the ystem is stablilized, a visual glance is all that is required, and the emaining time spent by the operator is the physical and visual checking f belts, motors, machinery, and oil levels. He also indicated that rom the location of the seat where the operator may sit, he cannot bserve the entire system, and is unable to check conveyor belts, worn dlers, or pulleys, nor can he check for required maintenance which may ccur and which could be taken care of while the system is operational. he primary function of the crusher operator is to insure that the mill s functioning properly and that no major damage will occur. If it oes, the mill will have to shut down and production is thereby interrupted. e believes the operator has to be constantly mobile in order to perform is job properly and effectively (Tr. 85-88).

With regard to the duties of the ball mill operator, Mr. Lawrence estified that once the critical start-up is achieved, his primary unction is to periodically, on an hourly basis, go through the mill nd take samples of the materials being processed. He explained the ampling process and stated it cannot be done effectively with the perator enclosed in a booth. He also indicated that the operator must

visually inspect the cyclone, take care of any minor problems whic
be detected before they result in major items, and that he must al
check motor bearings and grease them manually. These duties requi
constant mobility by the operator. He also stated that cyclone ur
and overflows cannot be visually observed from inside a booth, and
require visual monitoring, including the taking of cyclone samples
four or five locations. The sampling time for each sample takes a
five minutes for each location, and possibly ten minutes to make a
determination (Tr. 88-91).

Mr. Lawrence testified that the contestant has attempted to c
noise at one of its other mills, and that the mill is similar to t
in question in these proceedings. He stated that contestant has e
$135,000 at the Young Mill, and that this has resulted in reducing
noise levels one or two decibels. He conceded that it was possibl
compliance could be achieved with the use of sound booths, but mai
that the operators could not perform their job tasks from such boo
(Tr. 92). Mr. Lawrence stated further that the use of booths in a
least one other plant was for the purpose of protecting the operat
from the weather rather than for reduction of the noise exposure (

On cross-examination, Mr. Lawrence stated that it was his vie
that the operators in question were required to be in motion the m
of their work time in order to perform their job tasks properly.
indicated that he has spent a complete eight hour shift with these
and in his opinion they could not remain in the booth for as long
an hour each shift and still do their jobs properly. He reiterate
that he believed were required of the two operators in question, a
indicated that he has explored the possibility of using rubber lin
to reduce the noise levels, but found that they were very expensiv
were short lived. (Tr. 95-102). In response to bench questions, M
testified that since the time he has been employed at the mill
no previous citations for exceeding the noise levels had ever beer
(Tr. 108).

Ivan Campbell, testified that he is an electrical engineer an
has a degree from the University of Colorado. His experience incl
the installation and maintenance of both mechanical and electrical
equipment, and that he is responsible for contestant's Tennessee m
He stated that he was familiar with the citations which were issue
these cases and is familiar with the job duties of the cited opera
In his view the operators could not satisfactorily perform their j
if they were enclosed in booths for any ten to fifteen minutes eac
of their shifts. He explained the duties required of the operato
question, and emphasized the fact that they are required to be mob
and to walk around checking out the entire system. He detailed ea
of the duties required by the operators in question, and expressed
the opinion that they were required to be continually in motion o
around to properly perform their job tasks (Tr. 111-117). Mr. Cam
alluded to the expenditure of $135,000 by the contestant in an ef
by the contestant to reduce the noise levels, short of installing
but stated that he was not directly involved in the program (Tr.

the University of Colorado and that he has been involved in safety matters for the past 30 years. His job with the contestant concerns safety matters for the entire Tennessee Mines Division. He stated that he was familiar with the soundbooths utilized by American Limestone Company, one of the examples cited by the inspector, and he characterized the booths as "operator shacks" to protect the employees from the weather. He also stated that they were constructed from wood, operated with the doors open, and were not soundproof (Tr. 125). He also stated that the contestant has a hearing program which includes the use of earplugs as well as the use of audiometric technicians who examine employees for hearing problems. In addition, he referred to the fact that employees are given a choice of wearing three protective ear devices, and that annual noise surveys are made by the company, including the use of noise meters at various locations for the purpose of reducing noise exposure, all of which is paid for by the company.

Mr. Thompson was of the opinion that it would require an employee to spend four hours in a soundbooth in order to reduce his noise exposure from 95 dba's to 90 dba's. He also indicated that since the existing attempts to reduce the noise levels at the Young Mill have not resulted in any significant changes they were not used at the New Market Mill (Tr. 128).

On cross-examination, Mr. Thompson conceded that he was aware of the fact that the noise exposure for the operators in question were as stated in the citations, namely 96.5 and 95 dba's, and that is the reason they were required to wear personal ear protection devices (Tr. 128). He believed that compliance was being achieved through the use of these devices, and he did not believe that additional considerations are needed because it was his view that additional measures are not feasible (Tr. 130 He indicated that feasibility measures have been an on-going project for the past five years in attempts to find solutions at the mill in quest In his view, additional expenditures are not feasible because operators cannot function from a soundbooth (Tr. 131). He also alluded to the fact that the problems have been discussed among company management as wel as with Inspector Worth, and that in his view feasible controls of noise are not available, except through the use of earplugs (Tr. 131-133).

Mr. Thompson alluded to several specific methods considered for reducing noise, including enclosing the crusher from the rest of the building, use of rubber screens, moving the filter vacuum pump outside another building, insulating the walls of the building, relocating the flotation filter pump blower outside the building, and installing insulation barriers around the crushers (Tr. 134).

Findings and Conclusions

The contestant in these proceedings has been charged with two violations of the noise exposure requirements of mandatory standard

30 CFR 57.5-50(b), for exceeding the noise exposure levels for two of its employees, namely, a secondary crusher operator and a ball mill operator. In addition to the charges that the dBA exposures exceeded those levels required to be maintained by the cited standard, the citations also charge that the contestant was not using, and had not tr to use, recognized engineering noise controls such as those listed in certain guidelines contained in an April 8, 1977, publication used by MSHA inspectors when evaluating noise violations in the metal and nonmetal mining industry, or other industry known controls. Under the circumstances, I believe it is clear that MSHA has the burden of provin the fact that the noise exposure levels cited by the inspector were as stated in the citations, as well as the burden of proving the fact that feasible engineering controls are available for application by the contestant at the mill sites in question so as to bring the two cited employee operators into compliance with the required noise standard.

The so-called "recognized engineering noise controls" alluded to by the inspector on the face of the citations which he issued are incorporated in an MSHA document published April 8, 1977, entitled Engineering Noise Control Guidelines for Metal and Nonmetal Mine Inspec (exhibit ALJ-1), and pertinent introductory portions of that publicatio state as follows:

> These guidelines have been prepared for use by Mining Enforcement and Safety Administration (MESA) inspectors when evaluating noise violations in the metal and nonmetal mining industry. The engineering controls listed have been taken from actual cases and hence have been shown to be feasible and effective. It is important to note, however, that these controls must be considered on a case-by-case basis; not all may be feasible for a specific machine type. This consideration will require individual judgement by the MESA inspector.
>
> The mine operator must apply such noise controls as are considered feasible, in the judgement of the inspector, until noise levels are brought to within permissible limits. The controls listed can be applied in any order the mine operator chooses and alternative control methods may be acceptable. The inspector must judge whether or not a conscientious effort was made by the mine operator in applying engineering noise control methods. If in assessing a noise violation, a MESA inspector determines that additional assistance is necessary, the Noise Group at either Pittsburgh or Denver Technical Support Center should be contacted to evaluate the problem.

tained after all feasible control methods (including administrative controls) have been instituted, then adequate ear protection must continue to be used until new control techniques become feasible. (Emphasis supplied.)

The guidelines list surface crushers, screens, and chutes at page 14, d the following methods of noise control are listed:

1. Operator Booths

   a. Commercial. Operator booths can be purchased as prefab units from various manufacturers. Refer to attached "Buyer's Guide" from Sound as Vibration Magazine.

   b. Upgrading Existing Booths. Upgrading consists of adding acoustical material to interior roof and walls, sealing openings, repairing and sealing doors and windows, and isolation mounting. Refer to attached "Buyer's Guide" from Sound and Vibration Magazine.

   c. Fabricated. Operator booths can be constructed using common building materials, and should be acoustically treated as per "Upgrading."

2. Rubber Screen Deckings. Materials are available from various manufacturers.

3. Covered Screens. Dust control covers for screens may be upgraded to act as acoustical enclosures.

4. Enclosing Crushers and Screens. Crushers and screens may be partially or totally enclosed.

5. Chute Liners. Chutes can be lined at impact points with resilient material. These materials and information concerning their wear characteristics are available from various manufacturers or by contacting PTSC or DTSC.

Estimated Costs and Noise Reductions

1. Operator Booths. Properly designed and installed booths should result in noise levels at the operator's position of less than 90 dBA; costs for booths will range between $500 and $3,000.

2. Rubber Screen Deckings and Chute Liners. Information as to cost, life expectancy, effects on production, etc. should be obtained from the manufacturer and should be evaluated on a case-by-case basis.

The noise controls for ball mills are listed in the guideli at page 19, and they are as follows:

1. Operator Booths

   a. Commercial. Operator booths can be purchased as prefab units from various manufacturers. Refer to attached "Buyer's Guide" from Sound and Vibration Magazine.

   b. Upgrading Existing Booths. Upgrading consists of adding acoustical material to interior roo and walls, sealing openings, repairing and sea doors and windows, and isolation mounting. Re to attached "Buyer's Guide" from Sound and Vibration Magazine.

   c. Fabricated. Operator booths can be constructe using common building materials and should be acoustically treated as per "Upgrading."

2. Rubber Liners. Rubber liners are commercially ava from several manufacturers. Information as to lif expectancy, effects on production, etc., should be tained from the manufacturer and should be evaulat on a case-by-case basis.

3. Enclosing Mills

   a. Full Enclosures. Full mill enclosures can be fabricated or purchased as prefab units.

   b. Partial Enclosures. Partial enclosures for th feed and discharge ends of mills can be fabri using common building materials.

Estimated Costs and Noise Reductions

1. Operator Booths. Properly designed and installed booths should result in noise levels at the operat position of less than 90 dBA; costs for booths wil range between $500 and $3,000.

2. Rubber Liners. Information as to cost can be obta from the manufacturer. Noise reductions may range between 3 and 7 dBA.

Included as a "Buyer's Guide", the guidelines contain a lis manufacturers and suppliers of sound barrier systems, including booths, and a selected bibliography of several noise control pul and references.

that the two cited mill operators were wearing personal ear protection devices. Further, it seems clear that Contestant does not dispute the fact that the noise levels measured by the inspector in these proceedings were above those permitted by the cited noise standard. Its defense is based on subsection (b) of section 56.5-50, which states:

> (b) When employees' exposure exceeds that listed in the above table, feasible administration or engineering controls shall be utilized. If such controls fail to reduce exposure to within permissible levels, personal protection equipment shall be provided and used to reduce sound levels to within the levels of the table.

Contestant takes the position that it is not feasible to place the two mill operators in question in an acoustical sound booth because the nature of their job tasks is such as to require them to constantly move about the two buildings in which they are located so as to enable them to monitor, inspect, and service all of the machinery and equipment for which they are responsible. Contestant asserts that placing an operator in a soundbooth would not only restrict his mobility, but would impair his visibility and would inhibit his ready access to the equipment in the event of emergencies, and would unduly restrict his ability to visually observe the entire area over which he has responsib Further, contestant maintains that the mobility of the operators is most essential to a safe and productive operation, and that isolating the mill operators in a sound booth as suggested by MSHA would not only jeopardize the efficient operation of its milling process, but would result in a potential breakdown of its equipment and would result in th shutting down of its operation for major repairs. In short, contestant position does not rest solely on the costs which may be incurred in constructing or purchasing soundbooths, but is based on its belief that the nature of the work required to be done by the mill operators in question simply does not lend itself to placing them in sound booths

MSHA takes the position that soundbooths are in fact feasible nois controls at the two mill sites in question and that the contestant has not only failed to install them, but has not even made any attempts to try them out. MSHA also takes the position that by following the suggestions of its inspectors, the installation of soundbooths will reduce the level of noise to which each operator is exposed and will insure continued compliance with the requirements of the cited noise regulation.

In its post-hearing brief, MSHA asserts that it has carried its burden of establishing the fact that the noise exposure as measured by its inspector for the secondary crusher operator and the ball mill operator exceeded the permissible levels pursuant to the cited section 57.5-5-(b). In addition, MSHA argues that it has established that

the violations, and relies on the following in support of this c

1. Inspector Worth's testimony regarding the construction and layout of the two mill buildings in question, inclu the types, locations, and functions of the machinery involved, and the primary sources of noise affecting th two employees in question.

2. Inspector Worth's opinion and recommendations that the installation of readily available acountical soundbooth would reduce the noise exposure to the two employees ci MSHA asserts that the inspector's mining experience, co with his observations of the two men in question at the work locations support his conclusions that the install of soundbooths are available feasible administrative or engineering controls readily available to the contestan at minimal cost.

3. Inspector Worth furnished the contestant with a copy of 29 page booklet entitled 'Engineering Noise Control-Guid for Metal and Nonmetal Mine Inspectors", which asserted describes a variety of proven methods based on actual c for effective and feasible noise controls, including pr and available acoustical materials and equipment.

4. Inspector Worth's opinion, based on his knowledge of si job classifications and on his observations of the two employees in question over the eight hour sampling shif a significant portion of the employees' workday could b in a soundproof booth without impairing the accomplishm of their routine duties, particularly since they could monitor and observe the various machinery guages from i the booths.

5. MSHA Health Specialist Gardy's testimony that soundboot were readily available and were widely used throughout industry as a successful and economical method of reduc levels in milling and crushing operations similar to th conducted by the contestant.

In addition to the testimony presented by its inspectors, M argues that contestant's testimony concerning the job requiremen the two employees in question lacks credibility and "boggles the MSHA also contends that the contestant has not only never attemp basic steps to abate the conditions cited, but has never even co any controls at the New Market Mine Unit, and has opted to rely ear protection as sufficient protection against noise. Finally, points out that contestant's position concerning the use of soun

founded on economic considerations, and that since contestant is large corporation, MSHA believes that any of the basic controls le would require relatively insignificant expenditures.

ntestant's New Market Mill Unit is a metal mine which mines cesses zinc ore (Tr. 73-74). Contestant does not contest the of the inspector's noise level readings as stated on the face citations issued in these proceedings, nor does it contest the y or veracity of those noise meter readings as testified to by pector (Tr. 81). As a matter of fact, in its post-hearing contestant concedes that the results of its concurrent noise were substantially the same as those taken by the inspector. , contestant's arguments, as articulated by counsel in his brief, n its assertion that MSHA not only failed to establish that sound were feasible at the locations in question, but also failed to sh that other feasible engineering controls do in fact exist.

en though MESA's guidelines provide for several methods of reducing xposure, the inspectors in these proceedings take the position that tallation of soundbooths at the two mill sites in question here fectively solve any noise problems and will in fact facilitate nce. Under the circumstances, the critical question presented her MSHA can support its position in this regard by a preponderance credible evidence that it has offered to prove its case. ssion and analysis of the evidence presented by both parties follows

th regard to MSHA's reliance on the noise guidelines cited by pector in the citations, and in particular the assertion that they ed on actual cases and thus are proven feasible and effective s, MSHA conveniently omits the fact that the guidelines specifically hat the recommended controls discussed in that publication must idered on a case-by-case basis, that not all of the recommendations feasible for a specific machine type, and that this consideration quire individual judgment by the inspector. Since there are nds of metals and nonmetals, it stands to reason that there are nds of mills. Further, since I assume there are different methods le to process the material being mined at any one mill site, this ty supports a conclusion that no two mills may be identical in f the equipment, processes, and noise exposure. If this conclusion g, then I believe it is incumbent on MSHA to establish through e evidence that all mills are alike, and that the installation rkable soundbooth at some other mining operation supports its n that it will work at the mill sites in question in these lings.

also occurs to me that the source of any particular noise in a g which houses different kinds of equipment would be different, oise supression device which is workable in one area from where se source is located may not work in another area. It seems

mean that the individual worker is being overexposed to noise. Fro
my understanding of the requirements of the noise standard, the que
of whether an individual is overexposed to noise levels which may h
an adverse effect on his hearing mechanism is dependent upon the no
exposure time. Therefore, the time that any individual worker spen
any particular job task which exposes him to prolonged periods of e
noise becomes most critical to the question as to whether he is in
out of compliance with the dBA requirements of the standard. MSHA'
position seems to be that since all mill operators perform the same
tasks, isolating them in a sound booth for four hours during an eig
hour work shift will automatically bring them within compliance.
problem that I find with this rather simplistic approach is that MS
conclusions are based on speculative conclusions and opinions which
are unsupported by any credible evidence.

Although MSHA's health specialist Gardy testified that he was
familiar with contestant's mining operations and had inspected simi
mills and crushers, he admitted that he had never even seen the New
Market Mill in question. With regard to his testimony that similar
operators had successfully installed soundbooths, he conceded that
"similar" operators he had experience with were stone quarries and
ground mines and that he knows of not one single metal mill which h
such booths installed. His inability to cite any metal mills like
of the contestant to support his conclusion that soundbooths are fe
is based on his candid admission on cross-examination that he was n
familiar with contestant's mill and that he "did not know exactly w
you have out there" (Tr. 720). Further, while Mr. Gardy was of the
that general engineering devices are available for all noise contro
he conceded that he was not an engineer, nor an expert. As a matte
fact, he was not even aware of the fact that contestant had an audi
program, including an industrial hygiene department employing some
industrial hygienists. Finally, with respect to his conclusion tha
placing an individual in a soundbooth for two hours during a shift
lower his exposure to noise below the 90 dBA level, Mr. Gardy concc
that he had made no calculations to support that conclusion (Tr. 7
As a matter of fact, on direct examination, he conceded that his c
that soundbooths would reduce the noise exposure in these cases was
based on Inspector's Worth's testimony at the hearing, and even at
he stated that soundbooth's would likely bring about compliance (T

After careful consideration of Mr. Gardy's testimony, I have
concluded that it is of little value in support of MSHA's case.
Mr. Gardy is totally unfamiliar with the mine site in question, ha
been there, did not know what was going on there, knows of no sou
booths ever being installed in a mill similar to the one in questi
is not an expert, he never made any calculations to support his th
that the use of soundbooths at the mill in question would achieve
compliance, and was unaware of contestant's noise control program.
In short, MSHA have have been better off in not calling him as a w

s to control the noise exposure levels at the New Market Mine, ant's assistant mill superintendent Lawrence testified that the has expended $135,000 at the Young Mill, an operation similar New Market Mine Unit, and that the noise levels have reduced one decibels. He also alluded to the fact that consideration was given use of rubber liners but that they were very expensive and did t long. These efforts were confirmed by Mr. Thompson, and he ed that the contestant has an on-going hearing program staffed ometric technicians who conduct hearing tests, annual noise , and employee examinations for the purpose of detecting hearing s. He also indicated that all employees are allowed to choose ong three personal ear protection devices, and stated that several for reducing noise have been considered, including the use of screens, insulating the walls of the buildings, enclosing the from the rest of the building, relocation of equipment, and ing barriers around the crushers. Some of these control measures luded in MSHA's guidelines.

ntrary to MSHA's assertion that contestant has made no efforts ce its noise exposure levels, I conclude that the testimony of lent's witnesses supports a finding that contestant has in fact ed to reduce its noise levels. As a matter of fact, the record es that the expenditure of $135,000 has resulted in a reduction noise exposure at a similar plant. However, contestant's reluctance soundbooths obviously stems from its belief that the two employees constantly mobile and cannot safely and efficiently perform their ks while isolated in a soundbooth for the periods of time indicated inspectors. In response to the inspector's contentions that ooths are in use at other similar plants, contestant's witnesses ed that these booths are not acoustical soundbooths, but simply ures to protect employees from the weather.

Hilo Coast Processing Company v. Secretary of Labor, DENV 79-50-M, , 1979, Commission Judge Moore vacated several citations after that MSHA had failed to prove that certain engineering controls ended by inspector were technically and economically feasible. Moore found that for the most part, MSHA's proof was based on supported personal judgments of the inspector who issued the ns, and that the operator was left in the untenable position of ing" as to what was required by the inspector for compliance.

MSHA v. Callanan Industries, Inc., YORK 79-99-M, decided 12, 1981, Judge Melick vacated a noise citation after finding that d failed to establish through any credible evidence that its ed noise controls were either economically or technologically le.

fter careful review and consideration of all of the testimony idence adduced in these proceedings, I am not persuaded that MSHA tablished through any credible evidence that it is technologically

feasible to implement the recommendations of its inspectors at the mills in question. MSHA's case is one based on broad speculative and theoreti conclusions which have no sound factual or evidentiary support. In short, it is based essentially on the subjective opinion of one inspecto When viewed in light of the testimony and evidence presented by the contestant, I simply can find no support for MSHA's position.

As indicated earlier, I have given little or no weight to the testi of Inspector Gardy. With regard to the testimony of Inspector Worth, I believe that he made a rather cursory study of the noise levels to which the employees in question were exposed, and his testimony reflects that he had no in-depth perception as to precisely what the duties of a crusher or ball mill operator are, and it seems obvious to me that he ha no idea how long he spent monitoring the tasks required of those indivi As a matter of fact, he conceded that he was not familiar with the dutie of a ball mill operator, and the record reflects that he did not speak with the individuals, and apparently made no real attempt to ascertain precisely what they were expected to do during their working shifts. Further, as noted earlier, MSHA failed to call the two operators as witnesses, and simply relied on the so-called "expertise" of its inspect to prove its case. As correctly argued by the contestant in its post-he brief, MSHA's proof in this regard leaves much to the imagination.

With regard to the question concerning the mobility of the crusher operator and ball mill operator, I find that the contestant has establis through credible evidence by its witnesses that it is neither feasible nor practical to isolate the two individuals in a soundbooth for the duration of time suggested by the inspector. I further find that the contestant has established that these two individuals must be mobile so that they are fully able to observe, test, and otherwise insure the safe and efficient operation of the equipment and machinery for which they are responsible. Based on the evidence presented by the contestant subjecting these individuals to a soundbooth environment would seriously detract from their ability to effectively and safely perform their job tasks during their working shifts.

In view of the foregoing findings and conclusions, I conclude and find that MSHA has failed to establish that the contestant is in violati of the cited standards, and IT IS ORDERED that the citations issued to the contestant in these proceedings be VACATED.

George A. Koutras
Administrative Law Judge

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RETARY OF LABOR, MINE SAFETY AND LTH ADMINISTRATION (MSHA), on alf of MICHAEL J. DUNMIRE, and ES R. ESTLE, Complainants, v. THERN COAL COMPANY, Respondent.	APPLICATION FOR REVIEW OF DISCRIMINATION DOCKET NO. WEST 80-313-D WEST 80-367-D (Consolidated) MINE: Rienau No. 2

EARANCES:

derick W. Moncrief, Esq., Office of the Solicitor,
ted States Department of Labor,
ington, Virginia,
For the Complainants

rles W. Newcom, Esq.,
rman and Howard,
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For the Respondent

ore: Judge John J. Morris

DECISION

STATEMENT OF THE CASE

The Secretary of Labor of the United States, the individual charged h the statutory duty of enforcing the Federal Mine Safety and Health of 1977, 30 U.S.C. § 801 et seq.(the Act), brings this action on behalf complainants Michael J. Dunmire and James R. Estle. Complainants allege y were illegally discharged from their employment by Northern Coal pany (Northern) in violation of § 105(c)(1) of the Act.

The statutory provision allegedly violated provides as follows:

§ 105(c)(1) No person shall discharge or in any manner discriminate inst or cause to be discharged or cause discrimination against or erwise interfere with the exercise of the statutory rights

coal or other mine subject to this Act because such miner, representat
of miners or applicant for employment has filed or made a complaint un
or related to this Act, including a complaint notifying the operator o
the operator's agent, or the representative of the miners at the coal
other mine of an alleged danger or safety or health violation in a coa
other mine, or because such miner, representative of miners or applica
for employment is the subject of medical evaluations and potential
transfer under a standard published pursuant to section 101 or because
such miner, representative of miners or applicant for employment has
instituted or caused to be instituted any proceeding under or related
this Act or has testified or is about to testify in any such proceedin
or because of the exercise by such miner, representative of miners or
applicant for employment on behalf of himself or others of any statuto
right afforded by this Act.

After notice to the parties a hearing on the merits was held in Little Colorado, on July 24 - 25, 1980. The parties filed extensive post trial briefs.

ISSUES

The issues are whether complainants were discharged as a result of engaging in a protected activity. Further, if the finding is affirmative, relief, if any, should be granted.

APPLICABLE CASE LAW

The Commission has ruled that to establish a prima facie case for a violation of § 105(c)(1) of the Act a complainant must show by a preponderan of the evidence that (1) he engaged in a protected activity and (2) that th adverse action was motivated in any part by the protected activity. The employer may affirmatively defend, however, by proving by a preponderance o all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotecte activities alone. Secretary of Labor on behalf of David Pasula v. Consolidation Coal Company, Pitt 78-458, 2 BNA MSHC 1001.

FINDINGS OF FACT

Portions of the evidence are conflicting. I find the following facts be credible.

The swing shift working crew at Northern's Rienau Mine consisted of sh foreman Mike Morgan, Michael Dunmire, James Estle, two buggy drivers, and a extra man (Tr. 79, 83). On February 27, the crew worked on slope entry No. Estle operated the continuous miner which mines the coal. Dunmire served a the miner's helper. His duties included setting timbers and shovelling the ribs (Tr. 120).

Morgan, Daniels and Pobirk that he didn't want to be under the unsupported t shovelling the coal under the loose ribs while the continuous miner was operating (69-70). In the entire slopes area the top roof was bad and falli out (Tr. 65, 66, 82). Roof falls had occurred two to four times during the shifts while Estle was running the continuous miner (Tr. 66, 67). The entir slopes area had been in this same condition for two to three months (Tr. 134 On February 27, the roof and ribs were "blowing," that is, coal was flying o and the ribs were sloughing. There was "blowing out" behind the continuous miner (Tr. 83-84).

On February 27, the dust generated by the operation of the continuous miner reduced visibility to almost nothing. This condition caused Estle som concern about someone being injured. Estle complained about having to mine under the unsupported roof (Tr. 73). Estle told Morgan they should stop the mining operation, crossbar the roof, and find additional air. No one refuse to work during the swing shift on February 27, 1980. (Tr. 83-87).

On February 28, Estle was told that the Mike Morgan crew was being brok up. Estle also learned that the plant superintendent approved the decision because foreman Morgan was spending too much time running the continuous min le was also told, as an additional reason for breaking up the crew, that Mor was not keeping up with his supervisory duties including the roof control an rock dust plan (Tr 219-221, 238, 256).

Immediately before starting the swing shift on February 28, 1980, Estle talked to Rod Shaw, the continuous miner operator, from the previous shift. When asked about the top, Shaw said it was as bad as last night and "blowing out" [1] (Tr. 93-94). Estle walked to the Stamler, where it was the custom to discuss mining conditions, and advised the crew the top was bad (Tr. 95).

Dunmire then said he'd run the tailpiece or the Stamler during the shif Morgan, the foreman, stated that since he lacked experienced men Dunmire wou have to serve as a miner's helper. Morgan also replied that if he (Dunmire) didn't want to do it he knew what he could do. At this juncture Estle interjected the remark that Dunmire could "get his bucket and go home" (Tr. 96, 141, 142). Estle's statement, given by him in a joking manner, was immediately ratified by Morgan. Dunmire left. Estle told the crew they sho all go out with Dunmire. At this point foreman Morgan credits himself or cr remember Petree as stating to Estle that if he went out, "you'll be cutting yo own throat." No one left (Tr. 97, 261).

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[1] The testimony of witness Gene Moore corrobrates Shaw's testimony and it appears in the discussion, infra. The writer finds Moore's testimony credib but it is not included at this point because Moore did not advise the Dunmire/Estle crew, of the conditions.

was leaving. Estle did not raise any safety issues with Morgan before aving the worksite. Morgan knew Estle had a back problem (Tr. 98, 107, 12 4, 139). Estle repeated his explanation about being sick to plant perintendent Pobirk before he left the mine (Tr. 102). Estle stated he wo ve gone home "regardless" since he didn't feel good (Tr. 99). That aftern tle drove to Rifle, Colorado and he sought medical attention the following r. 99, 106).

After the incident at the Stamler, Dunmire and Estle were told by Northe pervisor Pobirk that since they had walked off the job they had quit r. 164, 228). Dunmire argued with Pobirk. He told him he wanted to work t he didn't think the top was safe. Dunmire said he wanted the miner shut wn while he set the timbers, established ventilation, and shovelled the ri birk told Dunmire that he was terminated (Tr. 164-165).

Estle contended he did not quit, but left for medical reasons. Accordi him, a worker was permitted to go home if he was sick (Tr. 137). When Es tempted to present his medical excuse to mine management they told him tha ey considered him to have quit (Tr. 103).

Estle returned to the Northern mine about three weeks later. Estle tol rthern personnel that he would drop his discrimination charge if he was hired with back pay and a lost week of vacation (Tr. 104). He was told he uld not be rehired because then if anyone else wanted to walk out they cou it and get away with it (Tr. 104).

There is a wealth of evidence dealing with the operation of the continu ner, with the crew's production of coal (generally excellent), with safety mplaints involving electrical equipment, and with the mining process itsel ch evidence is not generally dispositive of the issues presented by the rties.

CONTENTIONS REGARDING
MICHAEL J. DUNMIRE

Northern initially asserts that Dunmire quit or that Northern could tak s action as a quit. I disagree. The credible evidence establishes that nmire refused to work as a miner's helper under a bad roof. He was forthwi scharged. Morgan does not dispute complainant's version of the facts at t amler. Immediately after the Stamler incident Pobirk told Dunmire that he nsidered him to have quit because he walked off the job. Dunmire argued w m and told him that he still wanted to work but didn't think the top was fe. He also wanted the miner shut down while he set the timbers, establis ntilation, and shovelled the ribs. Pobirk then said Dunmire was terminate r. 164-165).

Northern's further arguments focus on the alleged failure of Dunmire ar tle to articulate that an unsafe work condition existed; further, that nmire and Estle failed to examine the work area; finally, that the work ar s not, in fact, unsafe.

I find from the uncontroverted facts that Dunmire had previously plained to company supervisors Morgan, Daniels, and Pobirk that he did not t to shovel coal under the unsupported roof while the continuous miner was rating (Tr. 69-70). No such complaints were made by Dunmire on February 2 Morgan. However, one must consider these prior complaints as evidence tha gan and Pobrick knew Dunmire was concerned about the unsafe condition of t f. The montage upon which is based the finding that Dunmire exhibited to gan that he was leaving for safety reasons and was consequently fired is: crew is together at the Stamler; Estle advises them of the bad top; Dunmi this juncture refuses to work as a miner's helper; he is forthwith minated by the crew foreman, Morgan, and the termination is confirmed by t e superintendent Pobirk.

Northern correctly states the law that before a miner can trigger the crimination provisions of the Act there must be some claim that the ditions the employee is working in, or about to work in, are unsafe. Tayl ins et al v. Deskins Branch Coal Company, PIKE 76-66, 2 BNA MSHC 1023, gree with Northern that Dunmire himself on February 28 made no safety ated complaints to Morgan (Tr. 176). However, it is apparent from the abo ted circumstances that Morgan, the foreman, knew Dunmire's refusal to work based on what he considered to be the unsafe roof Cf Mine Workers Local 0 v. Consolidation Coal Company, MORG 76 X 138 IBMA No. 77-43, 2 BNA MSHC 2. Additionally, Dunmire expressed his concern about the unsafe roof ditions to Pobirk in his office after the incident at the Stamler. Pobirk ponded by saying Dunmire was terminated (Tr. 164, 165, 281, 282).

In support of its view, Northern relies on Secretary of Labor and Charle Miller v. Old Ben Coal Company, Docket No. LAKE 79-282-D, 1 BNA MSHC 2333 llips v. Interior Board of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir 4), and Secretary of Labor ex rel. Billy Gene Kilgore v. Pilot Coal Compan 79-144-D, 1 BNA MSHC 2363.

The above cases do not support Northern's arguments. In Charles W. ler the dialogues between the miner and management were, at best, mere agreements. As such they could not form the basis for a discrimination rge. In Phillips the miner did in fact complain to the foreman and the mi ety committee. Billy Gene Kilgore did not involve a safety hazard. The er's refusal to drive the hauler truck was based on his fear of injury due his lack of experience. No protected activity existed. In none of the ed cases is there a factual situation compatible with the facts here. It arent from the circumstances here that Dunmire refused to work under the upported roof and for this refusal he was discharged.

Northern further directs its argument to the failure of Dunmire and Estl examine the area alleged to be unsafe. At the outset I agree with Norther t neither Dunmire nor Estle entered the mine immediately prior to starting swing shift on February 28, 1980.

It is not necessary to make such an examination. The evidence is rsuasive that Dunmire refused to work as a miner's helper because he though e roof condition was unsafe. Dunmire's belief that the roof was unsafe is sed on the following events: On February 27 the miners were in the no. 1 try in the slopes. In the entire slopes area the top roof was bad and lling out (Tr. 65, 82, 66). Roof falls occurred two to four times during t ior swing shifts while Estle was running the continuous miner (Tr. 67). The of and ribs were "blowing", that is, coal was flying out and the ribs were oughing. There was "blowing out" in behind the continuous miner (Tr. 83-84 e entire slopes area had been in the same condition for two to three months r. 134). Immediately before starting the swing shift on February 28 Estle lked to Shaw, the continuous miner operator from the prior shift. Shaw ated to Estle that "the top was bad" (Tr. 95). Estle related this statemen the entire crew including the foreman (Tr. 95). At this point Dunmire fused to work. The credible evidence establishes the bases of a reasonable lief on Dunmire's part that the roof was unsafe.

Northern states that its evidence supports the view that the work area s, in fact, safe. Particularly, Northern relies on its witnesses Daniels, rgan, and Diaz. I do not find that Northern's evidence supports this oposition.

Daniels described the top as "fair" with the admonition that no coal min s good top (Tr. 223). Morgan agreed the roof was "flaking" (Tr. 267). As rgan sees it, the difference between flaking and falling is one of quantity describes a piece of coal as flaking if the size is one eighth of an inch to a foot. A roof fall is four or five feet high and fifteen to twenty fe ng. Diaz indicated the roof was flaking but not "too bad". He stated that is was normal for coal top. (Tr. 297). As indicated above, Northern's idence concerning the condition of the roof does not directly conflict with e complainants' evidence.

Based on the foregoing facts and for the reasons stated, I conclude that chael J. Dunmire's complaint of discrimination should be affirmed.

JAMES R. ESTLE

The facts concerning Estle have been established by the credible evidenc previously stated.

DISCUSSION

Northern's post trial arguments were directed in tandem at the Dunmire a tle cases. The issues concerning the failure of the miners to examine the rk area and whether the slope area was safe or unsafe have been resolved in e discussion of the Dunmire case. The same rulings are applicable in the tle case.

Northern's additional arguments are that Estle failed to articula
afety complaint, that he quit, and that he promoted an unauthorized strike
dditional arguments are directed to credibility issues.

The evidence shows that on February 28, at the Stamler, Estle advised
hole crew, including foreman Morgan, that they were "putting up with the s
ning as last night and I talked to Rod and he said the top was bad" (Tr. 9
his constituted the articulation of a safety complaint on behalf of the en
rew. Estle encouraged the crew to walk out in support of Dunmire because
ought Dunmire was being fired for refusing to work in unsafe conditions (
7, 98). Estle was exercising on behalf of Dunmire and the crew a statutor
ight to complain about unsafe conditions and the right to refuse to work u
uch unsafe conditions, Pasula, supra. The Act protects a miner exercisir
.. "On behalf of himself or others ... any statutory right ..." 30 U.S.C.
c)(1).

Northern's reply brief contends that Estle admitted he did not claim t
ere unsafe working conditions immediately prior to leaving the mine. (Tr.
07, Line 8-20). The portion of the transcript cited by Northern must be
onsidered in its context; namely, Estle admits he did not state an unsafe
ondition was his personal reason for leaving. As indicated above he had
lready complained that the roof was bad. Estle's reason for not raising t
afety issue again with Morgan is best expressed by his testimony.[2]

Justification for Estle telling Morgan he was leaving because of his b
roblem rather than restating the safety complaint is also found in the eve
hat occurred just prior to his leaving. As Dunmire left the section Estle
old the rest of the crew "we ought to go with him" (Tr. 261), Morgan[3]/ the
aid "well, if you go out, you'll be cutting your throat" (Tr. 261).

Northern contends Estle quit, or it could consider his actions as an
ntention to quit. I disagree. He was entitled to fall back on a health
eason for leaving since a worker could go home if he became sick (Tr. 137)
stle received medical attention the following day (Tr. 99, 106). When he
eturned to the mine to present his medical excuse he was told by managemer
hat they considered him to have quit because he had walked out of the mine
stle denied he had quit (Tr. 102, 103).

/ Q. If you thought there was something unsafe, why didn't you raise tha
ith Mr. Morgan?

.. I think the main reason is after you argue so long about things like tha
ou finally just say, "What the hell," you just do the best you can and tak
ew chances as you can and try to make your pay and get money to live on an
as tired of arguing about it.

/ Morgan attributes the statement to himself and then to Roy Petree. I
ttribute the statement to Morgan as he initially testified (Tr. 261).

Northern further asserts that if Estle was discharged any such action as justified since the uncontroverted evidence shows Estle promoted an nauthorized strike. In support of its position, Northern cites Secretary of abor ex rel Alfred A. Santistevan v. C F & I Steel Corporation, WEST 80-85-D BNA MSHC 2529. Northern's argument lacks merit. The facts must generate t onclusion that Estle was fired because he promoted a strike. The burden of roving such an issue rests with respondent, and there was no evidence to upport such a conclusion, cf David Pasula v. Consolidation Coal Company, upra.

Northern argues that complainants' testimony is not credible because they aised the safety issue the second time they saw management and after they ha owered. I disagree. When Dunmire left the Stamler, supervisors Pobirk and aniels were standing nearby on the surface. Dunmire asked each man if they anted to talk to him. Both replied "No". Dunmire continued on his way, rustrated and mad. He thought it best to take a shower and cool off (Tr. 64). In short, I do not find that Dunmire and Estle made up their stories etween the events at the Stamler and the conversations in Pobirk's office.

Northern urges that the evidence of an unsafe roof condition is nreliable. Northern says that roof conditions change rapidly and MSHA would laim foul if a defense were made that roof conditions on day one also existe day two. A portion of this issue was resolved in the discussion of the easonable bases for Dunmire's and Estle's belief that the roof was unsafe. ddition to the evidence previously discussed, I find the testimony of witnes ene Moore, a continuous miner operator, to be most persuasive concerning the ondition of the mine on February 28th. I have credited Moore's testimony ver that of the Northern supervisors because he was operating the continuous ner in the shift immediately preceding Estle's shift, and in the same area stle was to mine. Moore was, as the expression goes, "in the trenches." Hi estimony establishes that the crew was finishing the break through in No. 1 ntry and starting into No. 2 entry. Rod Shaw operated the continuous miner he first half of the shift. The roof and rib conditions in No. 2 entry were ot very good. During the shift the miners lost about three quarters of the oof (Tr. 181-188). When Moore left that day the ribs in No. 2 entry were oughing and blowing a bit (Tr. 189). Going out at the end of the shift.Moo eard Rod Shaw tell Estle that they should watch the top as it was very bad Tr. 181-190). Contrary to Northern's view and based on the foregoing estimony, I conclude the roof was unsafe on February 28th. Based on the oregoing facts and for the reasons stated I conclude that James R. Estle's omplaint of discrimination should be affirmed.

TEMPORARY REINSTATEMENT ORDER
of MICHAEL DUNMIRE

The thrust of Northern's argument is that it was error to deny its reque hat a full hearing on the merits of the Dunmire case be held at the time of

hearing on the temporary reinstatement order. The procedural rules*/ of Commission provide for a hearing on the temporary reinstatement order hin five days after the operator requests such a hearing. The purpose of hearing is to determine whether the Secretary's finding that the miner's plaint of discrimination was not frivolously brought was arbitrarily and ricious1y made.

In the present case, Chief Judge James A. Broderick entered a nstatement order as to Michael J. Dunmire on May 22, 1980. No reinstateme er was applied for on behalf of James Estle. On May 30, 1980, Northern uested a hearing on the order of temporary reinstatement. The parties eed to have the hearing held on June 6, 1980. The order directed that the ring be limited in scope by the terms of Commission Rule 44(a). On June 5 0, Northern moved for the consolidation of a hearing on the merits with th ring on the temporary reinstatement order, or in the alternative, for the edition of the hearing on the merits.

The hearing on the temporary reinstatement order took place as scheduled the hearing Northern renewed its motion to consolidate (Tr. 8-9, June 6, 0)).

The undersigned denied Northern's motion for an immediate hearing on the its on the grounds that the issues had not yet been framed inasmuch as a plaint had not been filed. The motion for an expedited hearing was grante the hearing on the merits was set for July 24, 1980.

DISCUSSION

Commission Rule 29 C.F.R. § 2700.44(a) defines the scope of the hearing temporary reinstatement order. Accordingly, the Commission rule takes cedence over Rule 65(a)(2) of the Federal Rules of Civil Procedure relied Northern to support its position that the hearing on the merits should hav consolidated with the hearing on the reinstatement order. Cf. Commission 29 C.F.R. § 2700.1.

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§ 2700.44 Temporary reinstatement proceedings.
Contents of application procedure: hearing. An application for nstatement shall state the Secretary's finding that the complaint of crimination, discharge or interference was not frivolously brought and the is for his finding. The application shall be immediately examined, and, ess it is determined from the face of the application that the Secretary's ding was arbitrarily or capriciously made, an order of temporary nstatement shall be immediately issued. The order shall be effective upon nance. If the person against whom relief is sought requests a hearing on order, a Judge shall, within 5 days after the request is filed, hold a ring to determine whether the Secretary's finding was arbitrarily or ricious1y made. The Judge may then dissolve, modify or continue the order

Dissolution of order. If, following an order of reinstatement, the retary determines that the provisions of section 105(c)(1) have not been ated, the Judge shall be so notified and shall enter an order dissolving order of reinstatement. If the Secretary fails to file a complaint withi days, the Judge may issue an order to show cause why the order of nstatement should not be dissolved. An order dissolving the order of nstatement shall not bar the filing of an action by the miner in his own lf under section 105(c)(3) of the Act and § 2700.40 of these rules.

Northern argues that the temporary reinstatement of a miner without an ortunity for the mine operator to counter the allegation of discrimination lates due process principles. Northern states that it should not be pelled to employ someone who was rightfully discharged. I agree that it i sible that the enforcement of the Act may result in the temporary nstatement of a miner who at the conclusion of all proceedings under the A l be found to have been properly terminated. However, Congress believed t the operator was in a better position than the miner to sustain any ancial loss caused by the delays necessary for the investigation and udication of the complaint. The legislative history is clear on this ue:

> Upon determining that the complaint appears to have merit, the Secretary shall seek an order of the Commission temporarily reinstating the complaining miner pending final outcome of the investigation and complaint. The committee feels that this temporary reinstatement is an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint. U.S. Senate Report, Report No. 95-181, 95th Cong., 1st. Sess. at 36-37 (1977).

It would be incongruous with the intent of Congress to require the retary to complete the investigation and prepare for a trial on the merits ore applying for the temporary reinstatement of the miner. Accordingly, th pe of the hearing on the application for reinstatement is limited to the ue of whether the Secretary acted arbitrarily and capriciously in finding t the complaint was not frivolously brought. At this hearing, the operato the opportunity to examine the facts upon which the Secretary's finding w ed and the procedures he employed to arrive at his determination. The jud t decide whether the Secretary's determination was based on a consideratio the relevant factors, namely; that the miner allegedly engaged in protecte ivity and as a consequence thereof was discharged or otherwise discriminat inst by the mine operator. The judge must decide whether there has been a ar error of judgment. However, the judge cannot substitute its judgment f t of the Secretary. The judge must also determine if the Secretary follow necessary procedural requirements. Citizens to Preserve Overton Park v. pe 401 U.S. 402 (1971).

Commission Rule 29 C.F.R. § 2700.44 complies with Congressional intent a not violative of due process. This was the ruling in a similar case decid the district court in Zeigler Coal Co., v. Marshall 502 F. Supp. 1326 D., Ill., 1980). The court there followed the precept that "Congress has ad latitude to readjust the economic burdens of the private sector in herance of a public purpose. Only if Congress legistates to achieve its pose in an arbitrary and irrational way is due process violated," citing hman Corp. v. Pension Benefit Guarantee Corp., 592 F.2d 947 (7th Cir. 9), citing Usery v. Turner Elkhorn Mining Co., 429 U.S. 1, 15 (1976). In gler the court specifically ruled that the governmental interest in ouraging miners to report unsafe conditions was a legitimate goal and the ns chosen to accomplish it were rational.

Southern Ohio Coal Company v. F. Ray Marshall, 464 Fed. Supp. 450 S.D. Ohio, 1978, cited by Northern, does not support a different conclusion. In Southern Ohio the mine operator was not afforded any opportunity for a hearing. Under Commission Rule 29 C.F.R. § 2700.44(a) an operator may receive a hearing within five days of filing its request This provision provides due process under the circumstances here where t Congress, under certain conditions authorized "immediate reinstatement o the miner pending a final order on the complaint." 30 U.S.C. 815(c)(2).

Northern, at the hearing on the temporary reinstatement order, did not seek any evidence of the factual bases relied on by the Secretary to apply for the reinstatement of Dunmire. Contrary to the statement in Northern's brief, I ruled that such evidence was relevant (Tr. 21-22). Northern has not successfully overcome Commission Rule 29 C.F.R. § 2700.44(a). The temporary reinstatement of Dunmire was proper.

REINSTATEMENT

After the hearing the parties agreed that Michael J. Dunmire voluntarily left the employ of Northern Coal Company on August 22, 1980. (Statement filed September 29, 1980). The parties further agreed that if Michael J. Dunmire prevailed in his claim of discriminatory discharge then reinstatement would not be an appropriate remedy.

Inasmuch as James R. Estle's complaint of discrimination is affirme he should be reinstated.

CIVIL PENALTIES

In each case the Secretary seeks a civil penalty of $8,000 against Northern for the violation of Section 105(c) of the Act. Northern asser that the proposed penalty is unwarranted. I do not agree with Northern that the Secretary did not present any evidence in support of his propos penalty. The credible evidence has been reviewed and the complaints of discrimination have been affirmed. The Act provides that any violation the discrimination section shall "be subject to the provisions of sectio 108[5]/ and 110(a)."[6]/ The statute authorizes the imposition of a penalty in an amount not to exceed $10,000. 30 U.S.C. § 820(a). In assessing civil monetary penalties the Commission is to be guided by section 110(i)[7]/ of the Act. However, in construing a similar statute[8]/ setting forth factors to be considered in assessing penalties the United States Court of Appeals for the 8th Circuit stated that "[t]h

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5/ 30 U.S.C. 818
6/ 30 U.S.C. 820(a)
7/ 30 U.S.C. 110(i)
8/ 30 U.S.C. 666(j) which provides:

(j) The Commission shall have authority to assess all civil penaltie provided in this section, giving due consideration to the appropriatenes of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

assessment of penalties is not a finding but an exercise of a discretionary grant or power." Brennan v. OSHRC and Interstate Glass Company 487 F. 2d 438. (8th Cir., 1973).

Considering the pertinent statutes and in view of the facts, I deem a penalty of $3,000.00 to be an appropriate civil penalty in each case.

MONETARY AWARDS

After the conclusion of the hearing and the filing of briefs the undersigned entered an order directing the parties to stipulate to the potential back pay of complainants; in the event the parties could not agree, an evidentiary hearing would have been held. The stipulation was filed, together with supplemental briefs. Several secondary issues were presented in connection with the monetary awards. These are (1) whether complainants are entitled to the inclusion of vacation pay in the back pa award; (2) whether complainants are entitled to reimbursement for their expenses in connection with their attendance at the hearing; and (3) whether Estle's appropriate back pay period is from the day he was discharged to the day he resumed full employment status with another employer on April 14, 1980 or should back pay continue to accrue after April 13, 1980, less any interim earnings.

The initial issue concerns vacation pay. Dunmire and Estle had accrued a right to take one week's vacation. Northern takes the position that the workers have no such entitlement since the amount agreed to for regular earnings, shift differential, and overtime was full pay for each and every day they could have worked during the back pay period. Norther states that its policy regarding vacation pay requires that employees tak time off. They cannot elect to receive vacation pay in lieu of such time off.

The thrust of Northern's argument is directed at "double dipping", that is, an employee cannot, at the same time, draw vacation pay and regular pay. Although company policy requires an employee to take time o and prohibits an election to receive vacation pay in lieu of time off, such vacation pay, as a part of the employment contract, accrues and has monetary value. The award of vacation pay should accordingly be granted a portion of back pay.

The second issue concerns reimbursement of expenses in connection wi attending the hearings. Under Section 105(c)(2), in a discrimination proceeding brought by the Secretary, the Commission may direct "other appropriate relief," including an order incorporating affirmative action abate and "back pay and interest." A 105(c)(2) case brought by the Secretary does not directly authorize costs and expenses.

On the other hand, in a proceedings brought by a miner on his own behalf under Section 105(c)(3), in addition to back pay and interest, the Commission shall award a sum for "all costs and expenses." The apparent

conflict, as outlined above, is resolved by a review of the legistative history:

> It is the Committee's intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full seniority rights, back-pay with with interest, and recompense for any special damages sustained as a result of the discrimination. The specified relief is only illustrative. Thus, for example, where appropriate, the Commission should issue broad cease and desist orders and include requirements for the posting of notices by the operator.

S.Rep. No. 95-181, 95th Cong. 1st Sess. 37, reprinted in (1977) U. Code Cong. & Ad News 3400, 3437.

Application of the statutory standard has resulted in the reimbursement of lost equity in a truck (Secretary on behalf of E. Bruce Noland v. Luck Quarries, Inc., 2 FMSHRC 954), an employment agency fee (Secretary on behalf of William Johnson v. Borden, Inc., SE 80-46- DM A 13, 1981), transcript, court costs, and attorneys fees (Frederick G. Bradley v. Belva Coal Company, supra. Here, the expenses incurred in participation in the hearings are special damages necessarily resulting from complainants' prosecution of their claims. The statute intended t expenses to be borne by the individual whose conduct occasioned them.

Northern also argues that no expenses should be awarded Dunmire fo the hearing on the temporary reinstatement order because the Secretary asserted that no testimony could be taken regarding the merits of the c This point has been thoroughly discussed (supra, pages 8 - 11). In addition, there is no doubt that the presence of Dunmire was necessary the prosecution of his claim.

The third issue concerns the calculation of Estle's back pay. Est resumed full employment with another employer on April 14, 1980. The i is whether the appropriate back pay period should be from February 28, through April 13, 1980 or should back pay continue to accrue after April 13, 1980 less any interim earnings.

The back pay provisions of § 105(c) of the Act are patterned after provisions of Title VII of the Civil Rights Act. These provisions are modeled after the National Labor Relations Act, 29 U.S.C. § 160(c) Cf Albemarle Paper Co v. Moody 422 U.S. 405 (1975). NLRB precedent indicat that as a general rule back pay is the difference between what the empl would have earned but for the wrongful discharge less his actual interi earnings. OCAW v. NLRB, 547 F. 2d 598 (D.C. Cir., 1976). Basically thi would be gross pay less net interim earnings. The employer is also responsible for complying with applicable state and federal laws on the

withholding of taxes, etc. Cf Social Security Board v. Nieratko, 327 U.S. 358 (1946), Bradley v. Belva Coal Company WEVA 80-708-D. (April 1981).

Based on the case law stated above the back pay should continue to accrue less any interim earnings. OCAW v. NLRB, supra. However, Northern argues that Estle's award of back pay is limited by his pleadings which sought back pay only through the time when he "resumed full employment status with another employer."

According to the stipulation the back pay through his reemployment date on April 13, 1980 is $2,485.78 (plus vacation pay). On the other hand, according to the stipulation, Estle's back pay through March 6, 1981 less interim earnings, would be $5,442.41.

Northern indicates there is no case authority dealing with this issue. Its argument is that under the doctrine of equitable estoppel the Secretary should be precluded from seeking a larger award of back pay because Norther relied on the initial claim in the pleadings during the settlement negotiations. Northern says it would be inappropriate and inequitable to change the rules one year later. Northern also contends th doctrine of mitigation of damages is applicable. In support of its position Northern cites State Farm Mutual Automobile Ins. Co. v. Petsch, 261 F. 2d 331, (10th Cir, 1958); Phelps Dodge v. N.L.R.B., 313 U.S. 177, 6 S. Ct. 845 (1941), and U.S. v. Lee Way Freight, Inc. 625 F. 2d 918, (10 Cir. 1979). I do not find these cases controlling.

Concerning the issue of equitable estoppel, it is well settled that the United States government is not in a position identical to that of a private litigant when it is involved in the enforcement of laws enacted by Congress. U.S. v. Hibi 414 U.S. 5 (1973). State Farm is inapplicable sinc it was a suit brought by an insured against the insurer. The Supreme Cour has held that as a general rule neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest. Hibi citing Utah Power & Light Co. v. U.S. 243 U.S. 389. As explained above, Estle has a statutory right to the accrual of back pay after April 13, 1980 less any interim earnings. The governmer cannot be estopped from enforcing this right.

Further, the relief awarded in a judgment is not limited to that demanded in the pleadings. Federal Rule of Civil Procedure 54(c).

Northern's additional argument concerns the legal requirement that al persons must mitigate their damages. Northern's argument focuses on the proposition that Estle did not seek temporary reinstatement. Therefore, the argument goes, given the limited request for relief, Estle failed to mitigate his damages in that he chose to retain a lower paying job rather than to seek a return to Northern pending resolution of his complaint.

I disagree. The facts do not support such a "choice" by Estle nor is the Act subject to the construction Northern now urges. Estle returned to Northern and was advised he could not be rehired. He then mitigated his damages by obtaining other employment. The order herein based on the

will continue to accrue until Estle is reinstated or until he wai
right.

Based on the stipulation and for the foregoing reasons I con
following monetary awards should be made:

MICHAEL J. DUNMIRE

Back pay	$6,208.10
Vacation pay	454.00
Expenses in attending hearing:	
June 6, 1980	162.04
July 24-25, 1980	236.58
	$7,060.72

JAMES R. ESTLE

Back pay through March 6, 1981	$5,442.41
Vacation pay	492.00
Hearing expenses	253.78
	$6,188.19

Based on the foregoing findings of fact and conclusions of la
the following:

ORDER

Case No. WEST 80-313-D
Michael J. Dunmire

1. Complainant Michael J. Dunmire was unlawfully discrimin
against and discharged by respondent for engaging in an activity p
under Section 105(c) of the Act, and said complainant's charge of
discrimination is sustained.

2. Respondent is ordered to pay Michael J. Dunmire the sum
$7,060.72 consisting of the following:

Back pay	$6,208.10
Vacation pay	454.00
Incidental expenses for attending hearing:	
June 6, 1980	162.04
July 24-25, 1980	236.58
	$7,060.72

3. The employment record of Michael J. Dunmire is to be completely expunged of all comments and references to the circumstances involved in his discharge.

4. A civil penalty in the amount of $3,000.00 is assessed against respondent for violating Section 105(c) of the Act.

Case No. WEST 80-367-D
James R. Estle

1. Complainant James R. Estle was unlawfully discriminated against and discharged by respondent for engaging in an activity protected under Section 105(c) of the Act, and said complainant's charge of discrimination is sustained.

2. Respondent is ordered to reinstate James R. Estle to the position from which he was discharged, at the present rate of pay of said position, and with the same or equivalent duties as assigned prior to his discharge, without the loss of seniority or other benefits.

3. Respondent is ordered to pay James R. Estle the sum of $6,188.19 consisting of the following:

Back pay through March 6, 1981	$5,442.41
Vacation pay	492.00
Hearing expenses	253.78
	$6,188.19

Further, respondent is ordered to pay interest on said back pay and vacation pay from February 28, 1980 , at the rate of 12 1/2% per annum.

4. The employment record of James R. Estle is to be completely expunged of all comments and references to the circumstances involved in his discharge.

5. A civil penalty in the amount of $3,000.00 is assessed against respondent for violating Section 105(c) of the Act.

John J. Morris
Administrative Law Judge

9/ Interest rate used by Internal Revenue Service for underpayments and overpayments of tax, Rev Ruling 79-366. Cf Florida Steel Corporation, 231 N.L.R.B. No. 117, 1977-78, CCH, N.L.R.B. Para 18,484; Bradley v. Belva Coal Company, supra.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

MAY 29 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding	
	:	Docket Nos.	Assessment Control
	:	KENT 79-264	15-01554-03005
v.	:	KENT 79-265	15-01554-03006
	:	KENT 79-370	15-01554-03008
EDDIE COAL COMPANY, INC., Respondent	:	KENT 80-131	15-01554-03010
	:	No. 14 Mine	

DECISION

Appearances: William F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Herman W. Lester, Esq., Combs and Lester, PSC, Pikeville, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued April 18, 1980, as supplemer on April 28, 1980, a hearing in the above-entitled proceeding was held c June 3, 1980, in Pikeville, Kentucky. The four Proposals for Assessment Civil Penalty involved in this proceeding allege a total of 59 violation of the mandatory health and safety standards. Toward the end of the fi day of hearing, evidence had been received and bench decisions had been rendered as to eight of the 59 alleged violations. Following a recess, counsel for the parties stated that they had reached a settlement agreer with respect to the remaining 51 alleged violations. Thereafter, counse for the Secretary of Labor filed on December 9, 1980, a motion for appro of settlement with respect to the 51 violations as to which no bench dec had been rendered.

The first portion of this decision will be a final issuance of the bench decisions rendered at the hearing with respect to the eight contes violations. The remaining portion of the decision will discuss the moti for approval of settlement. Under the parties' settlement agreement, re dent has agreed to pay reduced penalties totaling $2,850 in lieu of the penalties totaling $7,025 proposed by the Assessment Office.

ns reproduced below pertain entirely to the Propos l Penalty filed in Docket No. KENT 79-264. The be ghout the transcript following the completion of e the eight contested violations. The transcript pa lsions begin are shown following the headings for The introductory paragraphs which appear below und Violations" are applicable to all of the bench

Contested Violations

This consolidated proceeding involves four Proposals for Assessment of Civil Penalty filed by the Secretary of Labor. The Proposals in Docket Nos. KENT 79-264 and KENT 79-265 were both filed on September 13, 1979, and seek assessment of civil penalties for 20 and 19 violations, respectively, of the mandatory health and safety standards by Eddie Coal Company. The Proposals in Docket Nos. KENT 79-370 and KENT 80-131 were filed on October 17, 1979, and February 11, 1980, respectively, and seek assessment of civil penalties for 3 and 17 alleged violations, respectively.

The issues in a civil penalty case are whether violations occurred and, if so, what civil penalties should be assessed, based on the six criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977. Some of the criteria may be considered in a general manner so that the consideration of those criteria become applicable for an entire proceeding, such as this one, which involves a large number of alleged violations.

At least two of the criteria may be considered on a general basis in this case. As to those two criteria, there has been a stipulation by the parties. As to the criterion of the size of the operator's business, the parties have stipulated that respondent in this case is a small operator which produces at the present time about 134 tons of coal per day. It was first stated that payment of penalties would not cause the operator to discontinue in business (Tr. 5). [After the settlement conference, however, the parties stipulated that payment of penalties would have an adverse effect on respondent's ability to continue in business and a period of 90 days within which respondent would be required to pay the settlement penalties was requested (Tr. 185).]

Citation No. 712092 dated 2/13/79, Section 75.517 (Tr. 23)

Findings. Section 75.517 requires, among other things, that power wires and cables shall be insulated adequately and be fully protected. The violation alleged in Citation No. 712092 occurred because the operator had failed to use additional insulation where a cable passed through a permanent stopping before it connected to a water pump located in the main intake airway. The violation was nonserious and the operator was nonnegligent. It was stipulated that the operator made a good faith effort to achieve rapid compliance.

Conclusions. Although the former Board of Mine Operations Appeals has held that an operator is conclusively presumed to know what the mandatory health and safety standards are, the violation in this instance involves something that an operator would not necessarily have known that he was required to do, because the wire in this instance was in good condition and did not have any worn places on it. The wire

did have insulation on it so that the operator could have concluded that this particular wire was insulated adequately and was fully protected at the point where it passed through a permanent stopping. However, the inspector says that it is his policy to cite this type of violation any time there's a possibility that stress and wear on a wire might expose bare wires and bring about a possible shock or electrocution.

The purpose of the Act and the regulations is to make a mine just as safe as possible for the miners. Therefore, the inspector's motive was good and it undoubtedly is a worthwhile practice to have every possible protective step taken to assure that no one will be shocked or electrocuted. However, in assessing a penalty for this particular violation, I think that a very nominal penalty should be assessed in view of the circumstandes that I just recited. Consequently, a penalty of $1 will be assessed for this violation.

Citation No. 712094 dated 2/13/79, Section 75.303 (Tr. 61)

Findings. Section 75.303 provides, among other things, that belt conveyors on which coal is carried shall be examined after each coal-producing shift has begun and that "such mine examiner shall place his initials and the date and time at all places he examines." I find that no violation of section 75.303 was proven in this instance because the inspector cited a violation of that section based on his conclusion that no adequate preshift examination had been made. The violation which occurred, if any, was that the section foreman had failed to make an examination of the belt conveyor during the shift which was being worked at the time the inspector cited the violation.

Conclusions. I have run into this particular alleged violation on other occasions and each time the inspectors either cited a violation based on the fact that the section foreman had failed to make an onshift examination by omitting the checking of the conveyor belt or the inspector cited the operator for failure to make a preshift examination based on the fact that the inspector was unable to find the initials and date and time showing that the preshift examination had been made.

In this instance, the inspector says that the section foreman indicated that he had so much work to do in the mine that he had been unable to make an examination of the belt at the time the inspector was talking to the section foreman. The difficulty with citing the violation the way the inspector has done it is that he has based it on a conclusion that the section foreman must place his initials and the time and the date at the places examined when he makes an onshift examination of the conveyor belt. The way the sentence is worded in section 75.303, the examination of the belt conveyor is something that has to be done after the shift begins, but the mine examiner is required to place his initials and the date and the time at all places he examines and that initialing requirement connects back to the mine examiner who was involved in making a preshift examination.

It is my conclusion that the sentence about examining belt conveyors after the shift has begun is out of context with the requirements set forth in section 75.303 for the obligations and duties of the preshift examiner. I think that Citation No. 712094 so mixes the obligation of the preshift examiner with those of the section foreman, who was making the onshift examination, that it's an improper conclusion to assume from the fact that the inspector was unable to find these initials and the date along this conveyor belt that the onshift examination of the belt conveyor had not been made or wouldn't have been made on this particular day. As counsel for the operator has observed, the section foreman was with the inspector during part of the shift and, therefore, his inspection of the belt at that time may not have been done because he was with the inspector.

The inspector does not claim that the entries in the preshift examination book had not been made. Since there is no allegation that the examinations were not being made and were not being recorded, I cannot find that a violation occurred merely because the inspector was unable to find more dates along the conveyor belt than he did on February 13, 1979.

Citation No. 712095 dated 2/13/79, Section 75.1725 (Tr. 78)

Findings. Section 75.1725 provides that mobile and stationary machinery and equipment shall be maintained in a safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately. A violation of section 75.1725 occurred because the inspector observed on a 3,000-foot conveyor belt 36 bottom rollers which were stuck. The violation was moderately serious in the circumstances because none of the rollers were touching coal on the mine floor and the majority of them were in areas where there was moisture. The operator had failed to observe the stuck rollers during the preshift or onshift examination and they're easy to see and should have been located. Consequently, there was a rather high degree of negligence. The operator demonstrated a good faith effort to achieve rapid compliance.

Conclusions. Inasmuch as the violation was moderately serious, that there was a high degree of negligence, and that a small operator is involved, a penalty of $50.00 is appropriate. There is no history of previous violations to be considered, according to Exhibit No. 45.

Citation No. 712098 dated 2/13/79, Section 75.523 (Tr. 99)

Findings. Section 75.523 provides that electric face equipment shall be provided with devices that will permit equipment to be deenergized quickly in the event of an emergency. A violation of Section 75.523 occurred because the operator of the Joy loading machine had moved the panic bar on the machine to an upward position so that it would not quickly deenergize the equipment in the event of an emergency. The violation was serious in that it would be possible for an equipment operator to be caught and crushed against a rib because of his inability to reach the panic bar in an emergency situation. Some equipment

position to prevent accidental deenergization of the equipment. Unfortunately, when the panic bar is placed in an upward position, it is then not close enough to the operator to facilitate immediate usage of the panic bar in an emergency. The equipment operators' practice of placing the panic bar in an upward position has made it difficult for respondent to prevent the type of violation cited in this instance. The evidence indicates that respondent demonstrated a good faith effort to achieve rapid compliance.

Conclusions. As Mr. Taylor pointed out in his summary, the provisions of section 75.523-2 indicate that movement of no more than 2 inches should have to be made in order to actuate the deenergization device. There is no real argument in this instance as to whether the violation occurred. The question is whether a large penalty should be assessed because of the fact that the violation resulted from something that the equipment operator himself brought about. The Commission has recently held that mine operators are liable for violations regardless of fault, and the Commission has been very strict in requiring that a penalty be assessed in any situation where a violation has occurred because the philosophy behind the use of civil penalties is that penalties do deter the mine operators from allowing repeat violations.

In a situation such as this, I can sympathize with Mr. Lester's argument that it's difficult to replace miners and that a mine operator can't discharge one every time he violates a safety regulation. The only thing he can do is to insist upon stricter supervision by the section foreman over people who do not take safety as seriously as they should. But I think that the precedents would require me to assess a fairly large penalty in this instance in order that repeat violations of this nature are discouraged in every possible way. So, primarily, on the basis of the seriousness of the violation and recognizing that the operator is not guilty of a high degree of negligence in this case, a penalty of $50.00 will be assessed.

I notice under the criterion of history of previous violations that Exhibit 45 shows that the operator has two previous violations of section 75.523. It has been my practice to increase penalties when there is shown to be a history of previous violations. Therefore, considering the fact that a small operator is involved, the penalty will be increased by $10.00 under the criterion of history of previous violations to a total penalty of $60.00.

Citation No. 712099 dated 2/13/79, Section 75.400 (Tr. 133)

Findings. Section 75.400 provides that coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials shall not be permitted to accumulate in active workings. A violation of section 75.400 occurred because the inspector found isolated pockets of loose coal ranging in depth from 1 to 3 inches

in entries 1 through 7. The accumulations were near the ribs and were in an area which was 150 feet from the working face. The area was rock dusted except for the accumulations and, consequently, the violation was only moderately serious. Respondent had a program providing for cleaning in the area and apparently the accumulations resulted from shooting from the solid so as to cause coal to fall from the ribs. The evidence indicates that the operator showed a good faith effort to achieve rapid compliance.

Conclusions. The Commission in Old Ben Coal Company, 1 FMSHRC 1954, (1979), held that the mere existence of accumulations of combustible materials is a violation. The Commission said the purpose of the Act is to prevent fire and explosions as a result of accumulations of combustible materials.

In this instance, however, we have some very small accumulations and, although there is evidence that there are some permanent splices that existed in this working area, the fact remains that these particular accumulations were close to the rib and that the working area was wet except for the area close to the rib where the accumulations existed. Consequently, I feel that there was little chance of fire or an explosion from these particular accumulations, particularly since no methane has been detected in this mine. Therefore, I think that a small penalty should be assessed in this instance of $25.00. Exhibit 45 shows that respondent has previously violated section 75.400 on two occasions, so the penalty will be increased by $10.00 under the criterion of history of previous violations to a total of $35.00.

Citation No. 712100 dated 2/13/79, Section 75.601 (Tr. 151)

Findings. Section 75.601 requires, among other things, that disconnecting devices used to disconnect power from trailing cables shall be plainly marked and identified, so that disconnection of such devices can be easily determined through visual observation. A violation of section 75.601 occurred because the inspector found that, although the disconnecting devices for the trailing cables for the roof-bolting machine, the loading machine, and the shuttle car had been plainly marked at some time, the disconnecting devices were not plainly marked on the day that he wrote Citation No. 712100.

The violation was serious because, if a person had been asked to disconnect a given cable so that the electrician, for example, could work on the cable at a splice or for another reason, the failur of the person to disconnect the correct cable could result in a possible shock or electrocution.

There was ordinary negligence in this instance because the operator had at one time marked these cables and it is a question of fact as to how well marked they were at this time. There's always the

legible but might not have been legible to some other employee w might have been asked to disconnect these devices. The evidence that there was a good faith effort made to achieve rapid compli

Conclusions. Inasmuch as a small operator is involved, tha the violation was serious, and that there was ordinary negligenc a penalty of $55.00 would be assessed, but Exhibit 45 indicates the operator has a history of one previous violation of section Therefore, the penalty will be increased by $5.00 to $60.00 unde criterion of history of previous violations.

Citation No. 712703 dated 2/13/79, Section 75.200 (Tr. 174)

Findings. Section 75.200 requires that each operator submi roof-control plan applicable to his mine. Respondent's roof-con plan required that a pry bar be provided for each roof-bolting machine in the mine. A violation of section 75.200 occurred bec the pry bar was unavailable on the machine at the time the inspe asked about it. The violation was moderately serious and the op was guilty of ordinary negligence. There was a good faith effor made to achieve rapid compliance.

Conclusions. The inspector's testimony indicates that he b the violation was serious because he said, without the pry bar b available to the operator of the roof-bolting machine, it might been possible for the operator to leave loose material on the ro in an overhanging rib which would otherwise be taken down, if th pry bar were available. The inspector also referred to the exis of kettle bottoms in this part of the mine.

Respondent's witness stated that 75 to 80 percent of the ro the No. 14 Mine is sandstone and that the need for prying down m rials such as slate is not a common requirement in this mine. A tionally, respondent's witness indicated that people, other than operator of the roof-bolting machine, do take the pry bars for o purposes, even though respondent provides one for each roof-bolt machine.

In such circumstances, a penalty of $25.00 would be assesse but Exhibit 45 shows that Respondent has three prior violations section 75.200. Since a small operator is involved, the penalty will be increased by $15.00 to $40.00 under the criterion of his of previous violations.

Noncontested Violations

Docket No. KENT 79-264

Evidence with respect to Citation No. 712702, alleging a violati section 75.523, was introduced on transcript pages 154 through 165, I granted a request by respondent's counsel that no bench decision be

could call a witness to testify with respect to the violation (Tr. 164). After the parties entered into a settlement agreement, I granted their request that they be permitted to include the violation of section 75.523 among the violations which became a part of the settlement agreement (Tr. 186). On page 4 of the motion for approval of settlement, I am requested to rely upon the proof submitted at the hearing in approving the parties' settlement agreement with respect to Citation No. 712702. That citation alleged that respondent violated section 75.523 by having an ino erative panic bar on its battery-powered tractor. The Proposed Assessmen sheet in the official file shows that the Assessment Office considered th violation to have resulted from ordinary negligence, to have been serious and proposed a penalty of $106 which respondent has agreed to pay in full The evidence introduced at the hearing would support the findings made by the Assessment Office. Therefore, the parties' settlement agreement shou be approved with respect to Citation No. 712702. The evidence which resp dent would have introduced if a settlement had not been reached might hav caused me to make different findings from those made above, but since the parties agreed to settle the issues raised by Citation No. 712702, my rev is limited to determining whether the settlement agreement is reasonable, rather than whether a violation occurred and whether respondent's evidenc if it had been introduced, would require different findings from those wh were originally made by the Assessment Office.

Evidence was presented on transcript pages 176 to 184 with respect to Citation No. 712704, alleging a violation of section 75.517, but that alleged violation also became a part of the settlement agreement (Tr. 185 The motion for approval of settlement, at page 4, asks that I approve the parties' settlement agreement on the basis of the evidence received at pa 176 to 184. Citation No. 712704 alleged that respondent had violated section 75.517 by failing to reinsulate four small cracks in the trailing cable to the coal drill. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been serious, and proposed a penalty of $90 which respondent has agreed to pay in full. The testimony at the hearing shows that the potential hazard was greater than it was considered to be by the Assessment Office because the inspector st that the coal drill was sitting in water and that its trailing cable was lying in water when he first observed the coal drill (Tr. 180). Of cours the inspector did not make his examination of the drill and its cable unt the drill and its cable had been removed from the water, but he said that the cracks in the cable exposed any person who did touch the cable to possible electrocution. Inasmuch as the parties agreed to make this alle violation a part of their settlement agreement before respondent cross-examined the inspector or presented any evidence with respect to the alle violation of section 75.517, it would be improper for me to find, on the basis of the inspector's testimony alone, that the Assessment Office erre in failing to assign more penalty points than it did to this alleged viol under 30 C.F.R. § 100.3. It is sufficient, for settlement purposes, that

record. I find that the settlement agreement under which respondent has agreed to pay the full penalty of $90 proposed by the Assessment Office should be approved since the evidence supports the Assessment Office's findings.

No evidence was presented at the hearing with respect to any of the other 49 violations alleged in this proceeding. Therefore, from this poi to the conclusion of this decision, the only considerations are those whi are normally considered in a settlement proceeding, that is, whether the motion for approval of settlement gives adequate reasons for approving th amount of the penalties which respondent has agreed to pay.

Citation No. 712705 alleged that respondent had violated section 75.1722(b) by failing to provide a guard at the conveyor belt's tail pull The Assessment Office found the violation to have resulted from a high de of ordinary negligence, to have been serious, to have been abated in a no manner, and proposed a penalty of $140. Respondent has agreed to pay a r duced penalty of $60. The motion for approval of settlement states that a reduced penalty is warranted because it was unlikely that a person coul be injured by the tail pulley here involved and that the operator was en- titled to a reduction in assignment of penalty points under the criterion good faith abatement because the conveyor belt was stopped immediately af the citation was written and a guard was installed. I find that adequate reasons have been given for approving the reduced penalty.

Citation No. 712706 alleged that a violation of section 75.313 had occurred because the methane monitor on the loading machine was inoperati The Assessment Office found the violation to have resulted from ordinary negligence, to have been moderately serious, to have been abated in a nor manner, and proposed a penalty of $52. Respondent has agreed to pay a reduced penalty of $17. The motion for approval of settlement claims tha the reduction is primarily justified by the fact that respondent's mine h no history of ever having released any methane and the fact that responde stopped production to achieve compliance, thereby becoming entitled to maximum consideration for making an outstanding effort to achieve rapid compliance.

Citation No. 712707 alleged that a violation of section 75.604 had occurred because the trailing cable to the loading machine had permanent splices which were not effectively sealed to exclude moisture. The Asses ment Office considered the violation to have resulted from ordinary negli gence, to have been serious, to have been abated in a normal manner, and proposed a penalty of $90. Respondent has agreed to pay a reduced penalt of $30. The motion for approval of settlement states that the reduced penalty is warranted by the fact that, if a hearing had been held, the evidence would have shown that the cable was adequately insulated. It is also stated that respondent is entitled to a reduction of the penalty pro posed by the Assessment Office because respondent stopped production unti further work could be done to insulate the trailing cable.

Citation No. 712708 alleged that a violation of section 75.604 had occurred because the trailing cable to the coal drill had four permanent splices which were not effectively insulated to exclude moisture. The Assessment Office found the violation to have resulted from ordinary negligence, to have been moderately serious, to have been abated in a normal period of time, and proposed a penalty of $90. Respondent has agreed to pay a reduced penalty of $30 which the motion for approval of settlement justifies for the same reasons referred to above with respect to Citation No. 712707.

Citation No. 712709 alleged that a violation of section 75.200 had occurred because respondent had failed to provide straps in several entries where kettle bottoms were present in the roof. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been serious, to have been abated in a normal manner, and proposed a penalty of $106. Respondent has agreed to pay a reduced penalty of $30. The reduced penalty is said to be warranted by the fact that respondent stopped production to install the necessary additional roof support. The Assessment Office failed to give any consideration for rapid abatement.

Citation No. 712710 alleged that a violation of section 75.503 had occurred because a burst conduit to the batteries on a tractor prevented the tractor from being in permissible condition. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been moderately serious, to have been abated in a normal manner, and proposed a penalty of $66. Respondent has agreed to pay a reduced penalty of $20 which is said to be warranted primarily by the fact that respondent took extraordinary steps to gain compliance, whereas the Assessment Office gave insufficient consideration to respondent's effort to achieve rapid compliance.

Citation No. 712711 alleged that a violation of section 75.202 had occurred because several overhanging brows had not been taken down or supported. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been serious, to have been abated in a normal manner, and proposed a penalty of $106. Respondent has agreed to pay a reduced penalty of $30. The reduced penalty is said to be warranted by the fact that respondent was having a difficult problem in connection with brows left by shooting coal from the solid, that is, without use of a cutting machine. Respondent was attempting to eliminate the problem at the time the inspection was made and respondent stopped production to achieve rapid compliance.

Citation No. 712714 alleged that a violation of section 75.202 had occurred because several timbers along the roadway had been dislodged and had not been replaced. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been serious, to have been abated in a normal manner, and proposed a penalty of $106. Respondent has agreed to pay a reduced penalty of $30. The reduced penalty is said to be warranted primarily because of management's taking extraordinary steps to achieve rapid compliance.

occurred because respondent had failed to record the weekly examination of electrical equipment since no entries had been made in the book for 11 days preceding the inspection. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been non-serious, to have been abated in a normal manner, and proposed a penalty of $52. Respondent has agreed to pay a penalty of $17 which is said to be warranted by the nonserious nature of the violation and the fact that the Assessment Office failed to give respondent as much consideration for rapid abatement as the facts would warrant if a hearing had been held to develop all extenuating cicumstances.

Citation No. 712716 alleged that a violation of section 75.316 had occurred because respondent had not submitted an updated version of its ventilation, methane, and dust control plan. The Assessment Office found the violation to have resulted from ordinary negligence, to have been nor serious, to have been abated in a normal manner, and proposed a penalty of $38. Respondent has agreed to pay a reduced penalty of $12 which is said to be warranted by the fact that respondent submitted an updated pla on the day following the writing of the citation and thereby became entitled to maximum consideration for having achieved rapid compliance.

Most of the reductions in penalties under the settlement agreement for the violations alleged in Docket No. KENT 79-264 have been justified in the motion for approval of settlement on the basis that the Assessment Office gave no consideration for respondent's having taken extraordinary steps to achieve rapid compliance. I would normally consider a settlemer agreement to be somewhat contrived by relying upon that aspect of the cri teria to such a great extent if it were not for the fact that the testimc at the hearing supports such reliance (Tr. 159; 182-183). Therefore, for the reasons given above, I find that the settlement agreement as to the violations alleged in Docket No. KENT 79-264 should be approved.

Docket No. KENT 79-265

Citation No. 712717 alleged that a violation of section 75.1202 had occurred because respondent had failed to keep its mine map up to date by making temporary notations thereon. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been nonseri to have been abated in a normal manner, and proposed a penalty of $38. spondent has agreed to pay a reduced penalty of $5. The motion for appro of settlement states that the reduced penalty is warranted primarily beca respondent stopped production to achieve rapid compliance, whereas the As ment Office allowed for only normal abatement in assigning penalty points under 30 C.F.R. § 100.3.

Although the motion for approval of settlement does not discuss it, there is built into the Assessment Office's method of assigning penalty points under section 100.3 a practice which can be difficult to appraise some cases. The practice I am talking about is the Assessment Office's

ethod of assigning penalty points under the criterion of history of previous iolations. It should be noted that all violations alleged in Docket No. ENT 79-265 have assigned to them eight penalty points under the criterion f history of previous violations based (1) on the fact that an average of rom 11 to 20 violations were cited at respondent's mine each year during he 24 months preceding the occurrence of the violations alleged in this roceeding, and (2) on the fact that from nine-tenths of a violation to one iolation was written at respondent's mine each time an inspector spent day making an examination at respondent's mine. Assignement of eight enalty points under the criterion of history of previous violations causes ach penalty in Docket No. KENT 79-265 to be assessed a minimum amount of 16, apart from any amount to be assessed under the other five criteria.

The difficulty in adjusting for the Assessment Office's method of com- ting penalties under the criterion of history of previous violations is llustrated with respect to Citation No. 712712 here under consideration. he violation consists of the operator's failure to make temporary notations a mine map. The parties' settlement agreement has recognized the non- erious nature of the violation and has agreed on a nominal penalty of $5, t it is difficult to justify such a small penalty under the Assessment ffice's penalty formula described in section 100.3 because, under the ngle criterion of respondent's history of previous violation, the Assess- nt Office has proposed a penalty of $16 attributable solely to respondent's story of previous violations. There was introduced in evidence at the earing as Exhibit No. 45 a computer printout which shows that respondent s not previously violated section 75.1202. Therefore, in my opinion, espondent, in this instance, should be assessed no penalty under the cri- erion of history of previous violations. If one bears in mind, in this stance, the need to eliminate the basic penalty of $16 built into the ssessment Office's formula under the criterion of history of previous iolations, and then if one invokes the Assessment Office's formula for valuating the criterion of good-faith abatement, by recognizing that espondent should be given full credit for its rapid achievement of compli- ce, as claimed by the motion for approval of s tlement, the parties' ettlement agreement, under which respondent has eed to pay a penalty $5, can be approved.

Citation No. 712718 alleged that respondent d violated section 75.316 failing to provide a water spray at the dumping point. The Assessment fice considered the violation to have resulted from ordinary negligence, have been moderately serious, to have been abated in a normal manner, d proposed a penalty of $52, whereas respondent has agreed to pay a penalty $17 which is said to be warrented primarily by the fact that respondent opped production to achieve compliance and is therefore entitled to maxi- m consideration for rapid abatement.

itation No. 712724 alleged that respondent had violated section 75.516-1 using unapproved insulators to install power conductor. The Assessment fice found the violation to have resulted from a relatively high degree of rdinary negligence, to have been serious, to have involved a lack of good- ith effort to achieve compliance, and proposed a penalty of $275, whereas

that the reduced penalty should be justified primarily on the fact that th violation was corrected immediately. The evidence does not permit me to approve the reduced penalty on the basis alleged on page nine of the motic for approval of settlement because Exhibit No. 3 in Docket No. KENT 79-265 shows that the inspector issued Withdrawal Order No. 712741 when responden failed to take prompt action to abate the alleged violation. Respondent did not abate the violation until July 27, 1979. The order of termination stated that the improperly suspended cable was replaced with a new cable which could carry a much higher voltage than the cable originally cited for improper suspension.

I believe that a reduced penalty of $100 should be approved. The amount of $16 assigned by the Assessment Office under the criterion of history of previous violations can be eliminated because Exhibit No. 45 in this proceeding shows that respondent has not previously violated secti 75.516-1 or any subsection of that section. The finding that respondent failed to make a good-faith effort to achieve compliance can also be elimi nated along with the penalty of $20 associated with application of the criterion of respondent's effort to achieve rapid compliance. Additional the gravity of the violation was not as great as it was considered to be b the Assessment Office. Both of the aforementioned reductions are supporte by the fact that the inspector's order was modified to permit respondent t continue to use the improperly suspended cable for 3 months before a new cable was installed. If the violation had been as serious as it was consi ered to be by the Assessment Office, the inspector could not have extended the time for compliance for a 3-month period. In such circumstances, I find that respondent's agreement to pay a penalty of $100 should be approv

Citation No. 712729 alleged that respondent had violated section 77.1 by allowing dry grass and paper boxes to accumulate around the magazine us for storage of explosives and detonators. On page nine of the motion for approval of settlement, a request is made that the Proposal for Assessment of Civil Penalty be dismissed in Docket No. KENT 79-265 to the extent that it seeks assessment of a penalty for a violation of section 75.1301 on the ground that, if a further hearing had been held, the evidence would have shown that the combustible materials had accumulated a considerable distar from the explosives magazine and did not create a condition prohibited by section 75.1301. I find that good cause has been shown for granting the motion to dismiss, as hereinafter ordered.

Citation No. 712725 alleged that a violation of section 75.503 had occurred because the insulation was frayed on both sides of a cable reel c a shuttle car. The Assessment Office considered the violation to have re- sulted from ordinary negligence, to have been moderately serious, to have been abated in a normal manner, and proposed a penalty of $66, whereas respondent has agreed to pay a penalty of $21. The motion states in effec that a reduced penalty is warranted because the violation was not as seric as it was considered to be by the Assessment Office and that respondent should be given maximum consideration for good-faith abatement because production was stopped until the condition could be corrected.

occurred because respondent had not provided a frame ground for a shuttle car. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been serious, to have been abated in a normal manner, and proposed a penalty of $90, whereas respondent has agreed to pay a penalty of $75. The motion seeks to justify the reduced penalty on the ground that respondent is entitled to maximum consideratio for rapid abatement. Additionally, the Assessment Office assigned eight penalty points under the criterion of history of previous violations, whe Exhibit No. 45 shows that respondent has not previously violated section 75.703.

Citation No. 712727 alleges that a violation of section 75.1303 had occurred because respondent was using a shooting cable containing a tempo rary splice which had not been insulated at all. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been serious, to have been abated in a normal manner, and proposed a penalty of $106, whereas respondent has agreed to pay a reduced penalty o $30. The motion states that the reduction is warranted because of respon dent's rapid abatement. Additionally, Exhibit No. 45 shows that responde has not previously violated section 75.1303.

Citation No. 712728 alleged that a violation of section 75.1704 had occurred because water had accumulated in the No. 3 entry to a depth of from 8 to 10 inches. The No. 3 entry is a haulage roadway and a return air escapeway. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been serious, to have been abated in a normal manner, and proposed a penalty of $106, whereas respon dent has agreed to pay a reduced penalty of $35. The motion states that the reduced penalty is warranted by management's having taken extraordina steps to achieve compliance. Also respondent is entitled to a reduction the penalty because Exhibit No. 45 shows that respondent has not previous been cited for a violation of section 75.1704.

Citation No. 712625 alleged that a violation of section 75.400 had occurred because respondent allowed some cardboard boxes to accumulate around the explosives magazine located 150 feet from the working face. On page 10 of the motion for approval of settlement it is requested that the Proposal for Assessment of Civil Penalty in Docket No. KENT 79-265 be dismissed to the extent that it seeks assessment of a penalty for an alle violation of section 75.400 on the ground that the inspector who wrote th violation subsequently vacated the citation as having been issued in erro I find that the motion for dismissal should be granted as hereinafter ord

Citation No. 712626 alleged that a violation of section 75.1306 had occurred because respondent had allowed the wagon used to haul explosives to be parked in the shuttle car roadway while loaded with powder and deto nators and with the shuttle car's trailing cable resting against the expl sives wagon. The Assessment Office considered the violation to have resu

from ordinary negligence, to have been serious, to have been abated in a normal manner, and proposed a penalty of $106, whereas respondent has agreed to pay a reduced penalty of $30. The motion states in effect that the reduced penalty is justified by the fact that the violation was not as serious as it was considered to be by the Assessment Office and by the fact that respondent is entitled to maximum consideration for rapid abatement. Additionally, respondent has not previously violated section 75.1303.

Citation No. 712627 alleged that respondent had violated section 75.51 by failing to maintain a bell on a scoop in an operable condition. On page 11 of the motion for approval of settlement it is requested that the Proposal for Assessment of Civil Penalty be dismissed to the extent that it seeks assessment of a civil penalty for an alleged violation of section 75.512 because the inspector who wrote the citation later vacated it as having been issued in error. I find that the motion to dismiss should be granted as hereinafter ordered.

Citation No. 712628 alleged that respondent had violated section 75.1704-2(d) because a map to show designated escapeways from the working section to the main escape system had not been provided. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been nonserious, to have been abated in a normal manner, and proposed a penalty of $40, whereas respondent has agreed to pay a penalty of $ The motion states that a reduced penalty is warranted because respondent is entitled to maximum consideration for good-faith abatement. Also, Exhibit No. 45 shows that respondent has not previously violated section 75.1704.

Citation No. 712629 alleged that respondent had violated section 75.17 by failing to mark the second escapeway properly. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been nonserious, to have been abated in a normal manner, and proposed a penalty of $40, whereas respondent has agreed to pay a penalty of $13. The motion gives the same reasons for allowing a reduced penalty with respect to Citation No. 712629 as were given above with respect to Citation No. 712628.

Citation No. 712630 alleged that respondent had violated section 75.20 by failing to provide canopies for two main entries as required by respondent's roof-control plan. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been serious, to have been abated in a normal manner, and proposed a penalty of $106, whereas respondent has agreed to pay a penalty of $50. The motion states in effect that the reduced penalty is warranted because the violation was not as serious as it was considered to be by the Assessment Office and that respondent is entitled to maximum consideration for having achieved rapid compliance

Citation No. 712631 alleged that respondent had violated section 75.10 by failing to remove some rocks and trees from a highwall. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been moderately serious, to have been abated in a normal manner, and proposed a penalty of $78, whereas respondent has agreed to pay a penal

of $25. The motion states that the reduced penalty is warranted because respondent is entitled to consideration for rapid abatement. Additionally Exhibit No. 45 shows that respondent has not previously violated section 75.1001.

Citation No. 712632 alleged that respondent had violated section 77.1102 by failing to post warning signs to prohibit smoking and open flames near a storage area for combustible liquids. The Assessment Office considered the violation to have been the result of ordinary negligence, to have been nonserious, to have been abated in a normal manner, and proposed a penalty of $40, whereas respondent has agreed to pay a penalty of The motion states that the reduced penalty is warranted on the ground that the employees were aware of the location of the storage area and knew not to smoke in that area. It is also alleged that respondent is entitled to maximum consideration for rapid achievement of compliance. Finally, Exhibit No. 45 shows that respondent has not previously violated section 77.1102.

Citation No. 712634 alleged that respondent had violated section 75.3 because respondent had failed to note at seals in the mine that weekly inspections of the seals at an abandoned area had been made. The Assessment Office considered the violation to have been the result of ordinary negligence, to have been moderately serious, to have been abated in a normal ma and proposed a penalty of $66, whereas respondent has agreed to pay a redu penalty of $15. The motion states that the reduction in penalty is justif because the operator had examined the majority of the seals. It is allege that the violation was not as serious as it was considered to be by the Assessment Office because the mine has never been known to release any methane. It is also claimed that respondent is entitled to maximum consideration for rapid abatement. Additionally, respondent has not previous violated section 75.313, according to Exhibit No. 45.

Citation No. 712635 alleged that respondent had violated section 75.2 by failing to provide additional roof support for a return airway which is used to transport employees and supplies. The Assessment Office found the violation to have resulted from a high degree of ordinary negligence, to have been serious, to have involved a lack of good-faith effort to achieve compliance, and proposed a penalty of $305 which respondent has agreed to pay in full. The motion states that the Assessment Office properly evalua the criteria in this instance and that the full amount proposed by the Ass ment Office should be paid.

Citation No. 712636 alleged that respondent had violated section 77.1 because accumulations of grease, lubricants, and coal dust had been allowe to accumulate around the No. 1 belt conveyor drive located on the surface. The Assessment Office considered the violation to have resulted from ordin negligence, to have been moderately serious, to have been abated in a norm manner, and proposed a penalty of $66, whereas respondent has agreed to pa a penalty of $15. The motion states that the reduced penalty is warranted because the accumulated materials did not create a hazard on the surface c

rapid abatement. Also, Exhibit No. 45 shows that respondent has not previ
ously violated section 77.1104.

I find that the reasons hereinbefore given provide adequate bases for approving the parties' settlement agreement with respect to the violations alleged in Docket No. KENT 79-265.

Docket No. KENT 79-370

Citation No. 712093 was written under the unwarrantable failure provisions, or section 104(d)(1), of the Act. The citation alleged that respondent had violated section 75.1100-1(a) because the water supply for the waterline running parallel to the belt conveyor was frozen. The Assessment Office waived the formula provided for in 30 C.F.R. § 100.3 and proposed a penalty of $500 on the basis of narrative findings emphasizing the crite of negligence and gravity.

Order No. 712097 was written, under section 104(d)(1) of the Act, abou 2 hours after the citation described above was issued. The order alleged that respondent had violated section 75.701 by failing to provide a frame ground for a power cable supplying power to a submersible pump located abou 90 feet outby the section tailpiece. The frame ground wire existed, but it had not been connected because the section foreman had just not taken the time required to connect the wire when he installed the pump. The Assessment Office proposed a penalty of $500 for this alleged violation after mak narrative findings emphasizing the criteria of negligence and gravity.

Order No. 712701 was written about 2 hours after the order described the preceding paragraph was written. That order alleged that respondent ha violated section 75.512 by failing to maintain the brakes on a battery-powered tractor in a safe operating condition. The order alleges that a rod had broken so that the master cylinder could not be actuated by the bra pedal. The inspector considered the violation to be serious since the trac was used as a mantrip to take miners in and out of the mine. The Assessmen Office proposed a penalty of $750 for this alleged violation after making narrative findings emphasizing the criteria of negligence and gravity.

The three violations described above constitute all the violations for which penalties are sought by the Proposal for Assessment of Civil Penalty filed in Docket No. KENT 79-370. The motion for approval of settlement states that respondent has agreed to pay reduced penalties of $200, $165, and $369, respectively, for the violations alleged in the citation and two orders described above. The primary reason given for reducing the penalti proposed by the Assessment Office is that, in each case, respondent immediately corrected the violations. The inspector's sheets evaluating negligen gravity, and good-faith abatement show that respondent stopped production and immediately corrected the deficiencies cited in the citation and orders The operator's prompt action is not as impressive as it might be since two of the violations were cited in withdrawal orders which would have caused respondent to stop production in any event.

aring held as to some of the violations involved in this proceeding owed that respondent stopped production in order to achieve rapid com- iance with respect to ordinary citations. There is no doubt, therefore, t that respondent is entitled to maximum consideration for achieving rapi mpliance. The question which remains, of course, is whether rapid good- ith compliance is a sufficient consideration to warrant approval of a ttlement which reduces penalties proposed by the Assessment Office by percent solely on the ground that respondent rapidly complied with the ndatory safety standards after having been cited for violating them.

Although the motion for approval of settlement does not point it out, hibit No. 45 shows that respondent has not previously violated either ction 75.701 alleged in Order No. 712097 or section 75.1100-1(a) alleged Citation No. 712093. Respondent has once before violated section 75.512 leged in Order No. 712701. Section 75.512 refers to a general requiremen taking equipment out of service if it is not in safe operating condition previous violation of section 75.512 does not mean that respondent has cessarily previously failed to provide brakes for its tractor used as a ntrip.

The third aspect of the violations which merit acceptance of the settl nt agreement is that a small mine producing only 134 tons of coal per day involved. Consequently, moderate penalties are appropriate under the iterion of the size of respondent's business. Finally, as I have noted the first part of this decision, respondent's financial condition is suc at it has requested more than the usual 30 days within which to pay the ttlement penalties agreed upon in this proceeding. In such circumstances ur of the six criteria show that reduced penalties are appropriate with spect to the three violations alleged in Docket No. KENT 79-370. There- re, I find that the settlement agreement submitted by the parties in cket No. KENT 79-370 should be approved.

Docket No. KENT 80-131

The Proposal for Assessment of Civil Penalty filed in Docket No. KENT 1 seeks assessment of civil penalties for 17 alleged violations. Citatio . 712712 alleged that respondent had violated section 75.1704 by allowing om 7 to 18 inches of water to accumulate in the main intake airway which s also designated as an escapeway. The Assessment Office found the viola- on to have resulted from ordinary negligence, to have been moderately rious, to have been abated in a normal manner, and proposed a penalty of 80, whereas respondent has agreed to pay a reduced penalty of $60. The tion for approval of settlement states in effect that the reduced penalty warranted because the violation was not as serious as it was considered be by the Assessment Office.

It should be noted in connection with the 17 violations alleged in cket No. KENT 80-131 that the Assessment Office has increased the assign- nt of penalty points under the criterion of history of previous violation

$30 or $34 under that single criterion, whereas the Assessment Office evaluated all other violations alleged in this proceeding by assigning 8 penalty points, or $16, to each violation under the criterion of history of previous violations. Exhibit No. 45 in this proceeding shows that respondent has not previously violated section 75.1704. Therefore, some reduction in the penalties proposed by the Assessment Office is justified with respect to the violation of section 75.1704 and as to most of the violations alleged in Docket No. KENT 80-131.

Citation No. 712720 alleged that respondent had violated section 75.1 by failing to provide 240 pounds of rock dust at a temporary electrical installation. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been moderately serious, to have been abated in a normal manner, and proposed a penalty of $106, whereas respondent has agreed to pay a reduced penalty of $35. The motion states in effect that a reduction in the penalty is warranted because the violation was not as serious as it was considered to be by the Assessment Offic Exhibit No. 45 shows that respondent has once before violated section 75.1 The Assessment Office attributed $34 of its proposed penalty to the criter of respondent's history of previous violations. I believe that no more than $10 should be attributed to respondent's history of previous violatic when there is only one previous violation and a small operator is involved

Citation No. 713477 alleged that respondent had violated section 75.5 because a force of more than 15 pounds was required to actuate the emergen deenergization switch, or panic bar on respondent's No. 1 tractor. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been serious, to have been abated in a rapid manner, and proposed a penalty of $130, whereas respondent has agreed to pay a reduced penalty of $60. The motion states that a reduced penalty is warranted because a mechanic had been working on the panic bar to improve its responsiveness and that the violation was corrected in about 1-1/2 hours. In such circumstances, it is obvious that respondent's negligence was not as great as it was considered to be by the Assessment Office and a greater allowance for the operator's rapid abatement than was made by the Assessme Office is justified under the criterion of rapid abatement.

Citation No. 713478 alleged that respondent had violated section 75.5 because a force of more than 15 pounds was required to actuate the panic b on respondent's No. 2 tractor. The Assessment Office considered this secc violation of section 75.523-2(c) to have resulted from ordinary negligence to have been serious, to have been abated in a normal manner, and proposed a penalty of $140, whereas respondent has agreed to pay a reduced penalty of $60. The same reasons as those given in the preceding paragraph warran a reduction in the penalty proposed by the Assessment Office. The Assessm Office assigned 10 penalty points under the criterion of negligence for th preceding violation of section 75.523-2(c), but for some unexplained reasc assigned only 9 penalty points for the second violation of that section.

Also, the Assessment Office failed to consider that the second violation wa abated rapidly even though the mechanic succeeded in correcting both of the violations within a time period of less than 4 hours, even though the inspe tor had given respondent until the following morning within which to achiev compliance. The sort of erratic assessment procedure shown by the Assessme Office in this instance makes one wonder why we should write hundreds of pa to justify acceptance of penalties which are lower than those proposed by t Assessment Office.

Citation No. 713479 alleged that respondent had violated section 75.17 because the brakes on the roof-bolting machine were not operative. The Ass ment Office considered the violation to have resulted from ordinary negligen to have been serious, to have been abated in a normal manner, and proposed a penalty of $195, whereas respondent has agreed to pay a reduced penalty of $ The motion states in effect that the reduced penalty is warranted because the violation was less serious than it was considered to be by the Assessmen Office. Additionally, Exhibit No. 45 shows that respondent has not previous violated section 75.1725, so the Assessment Office's assignmentof $30 under the criterion of history of previous violations is excessive.

Citation No. 713943 alleged that respondent had violated section 75.604 by failing to maintain four temporary splices on the coal drill's trailing cable so that they would exclude moisture. The Assessment Office considered the violation to have resulted from ordinary negligence, to have been seriou to have been abated in a normal fashion, and proposed a penalty of $114, whe respondent has agreed to pay a reduced penalty of $37. The motion states in effect that the reduced penalty is warranted because the violation was not a serious as it was considered to be by the Assessment Office. Also the Asses ment Office attributed $30 of the penalty to respondent's history of previou violations, whereas Exhibit No. 45 shows that respondent has not previously violated section 75.604.

Citation No. 713944 alleged that respondent had violated section 75.316 because a water spray at the dumping point was inoperative. The Assessment Office considered the violation to have resulted from ordinary negligence, t have been moderately serious, to have been abated in a normal manner, and proposed a penalty of $106, whereas respondent has agreed to pay a reduced penalty of $20. The motion states in effect that a reduced penalty is justi fied because the violation was not as serious as it was considered to be by the Assessment Office.

Citation No. 713946 alleged that respondent had violated section 75.517 because power conductors were exposed at four different places in the traili cable supplying power to the coal drill. The Assessment Office considered t violation to have resulted from ordinary negligence, to have been very serio to have been abated in a normal manner, and proposed a penalty of $210 which respondent has agreed to pay in full. The motion states that the Secretary' position as to this violation is that it was very serious and resulted from a high degree of negligence and that the Assessment Office appropriately determined that a relatively large penalty should be assessed in this instan

ecause the roof-bolting machine did not have operative headlights on either
d. The Assessment Office considered the violation to have resulted from
rdinary negligence, to have been moderately serious, to have been abated
a normal manner, and proposed a penalty of $106, whereas respondent has
greed to pay a reduced penalty of $25. The motion states in effect that
reduced penalty is warranted by the fact that the violation was not as
erious as it was considered to be by the Assessment Office.

Citation No. 713948 alleged that respondent had violated section 75.110
ecause 240 pounds of rock dust had not been provided at a temporary electri
nstallation. The motion for approval of settlement requests that the Propo
or Assessment of Civil Penalty in Docket No. KENT 80-131 be dismissed to th
xtent that it seeks assessment of a penalty for this alleged violation
ecause, if the hearing had been completed as to all alleged violations, the
vidence would have shown that 240 pounds of rock dust were available at the
emporary electrical installation here involved. That motion to dismiss wil
e granted as hereinafter ordered.

Citation No. 713949 alleged that respondent had violated section 75.110
y having turned off the water valve through which water was supplied to
he waterline running parallel to the belt conveyor. The Assessment Office
onsidered the violation to have resulted from ordinary negligence, to have
een moderately serious, to have been abated in a normal manner, and propose
penalty of $114, whereas respondent has agreed to pay a reduced penalty of
38. The motion states that a reduced penalty is warranted because some
erson had turned off the water valve for the waterline without respondent's
anagement knowing of it. The motion concludes, therefore, that the violati
id not involve as much negligence and was not as serious as it was consider
o be by the Assessment Office.

Citation No. 713950 alleged that respondent had violated section 75.512
ecause a rear light on a tractor was inoperative. The Assessment Office
onsidered the violation to have resulted from ordinary negligence, to have
een serious, to have been abated in a normal manner, and proposed a penalty
f $140, whereas respondent has agreed to pay a reduced penalty of $46. The
otion states in effect that the reduced penalty is warranted because the
iolation was not as serious as it was considered to be by the Assessment
ffice.

Citation No. 713951 alleged that respondent had violated section 75.110
ecause it had failed to provide as much fire-fighting equipment for the
orking section as was required. The Assessment Office considered the vio-
ation to have resulted from ordinary negligence, to have been moderately
erious, to have been abated in a normal manner, and proposed a penalty of
130, whereas respondent has agreed to pay a reduced penalty of $42. The
otion states in effect that the reduced penalty is warranted because the
iolation was not as serious as it was considered to be by the Assessment
ffice.

because it had failed to provide a bar of suitable length for prying down loose materials from the roof. The Assessment Office considered the viola tion to have resulted from ordinary negligence, to have been very serious, to have been abated in a normal manner, and proposed a penalty of $240, whereas respondent has agreed to pay a reduced penalty of $40. The motion states in effect that the violation did not involve nearly as much negligence or gravity as was attributed to it by the Assessment Office. It is noted that pry bars of suitable length are located throughout the section and sometimes are removed from the roof-bolting machine where one is norma kept. The fact that respondent achieved compliance by providing an adequa bar within 10 minutes after the violation was cited shows that bars were readily available and indicates that respondent was entitled to a maximum reduction of penalty points under the criterion of rapid abatement.

Citation No. 714903 alleged that respondent had violated section 75.5 by failing to maintain a shuttle car in permissible condition. The Assessm Office considered the violation to have resulted from ordinary negligence, to have been serious, to have been abated in a normal manner, and proposed a penalty of $160, whereas respondent has agreed to pay a reduced penalty of $53. The motion states in effect that the reduced penalty is warranted because the violation was not as serious as it was considered to be by the Assessment Office in view of the fact that no methane has ever been detect in respondent's mine.

Citation No. 714904 alleged that respondent had violated section 75.5 because it had failed to maintain the roof-bolting machine in a permissibl condition. The Assessment Office considered the violation to have resulte from ordinary negligence, to have been moderately serious, to have been ab in a normal manner, and proposed a penalty of $122, whereas respondent has agreed to pay a reduced penalty of $40. The motion states in effect that the reduced penalty is warranted for the same reasons given in the precedi paragraph.

Citation No. 714878 alleged that respondent had violated section 75.2 because several timbers had been dislodged and not replaced along the mant and haulage roadway. The Assessment Office considered the violation to ha resulted from ordinary negligence, to have been serious, to have been abat in a normal manner, and proposed a penalty of $180, whereas respondent has agreed to pay a reduced penalty of $59. The motion states in effect that the reduced penalty is warranted because the violation was not as serious as it was considered to be by the Assessment Office. The inspector's stat ment evaluating negligence and gravity shows that he thought the violation was very serious. The only basis for allowing a reduction in the penalty $180 proposed by the Assessment Office in this instance is that a small op ator is involved and that its financial condition is poor. I am approving the settlement agreements in this consolidated proceeding largely for the reasons stated in the preceding sentence.

both parties, an evaluation of the criteria based on that evidence becomes entirely different from the routine application of the formula described in 30 C.F.R. § 100.3. The testimony of the various witnesses provides the occurrence of violations with many nuances of negligence and gravity which are not present apart from the impact of oral descriptions of events and responses by witnesses to detailed questions. The hearing in this proceeding demonstrates the effect that a hearing has on penalties determined on the basis of a formula as opposed to penalties based on testimony given at a hearing. The total penalties of $538 proposed by the Assessment Office for the eight contested violations which were the subject of the hearing were reduced in my bench decisions to a total of $246, or only 45 percent of the total amount proposed by the Assessment Office. The contested violations were not chosen by responder as being those as to which the inspectors might be especially vulnerable. The eight contested violations just happened to be the first eight violations alleged by the Proposal for Assessment of Civil Penalty filed in Docket No. KENT 79-264.

The 51 violations as to which settlements were reached involve a reduction in the total penalties of $7,025 proposed by the Assessment Office to $2,850, or only 40 percent of the amount originally proposed by the Assessment Office. The fact that the settlement amount is very close to the result which occurred with respect to the hearing held as to the contested violations makes me believe that the settlement agreements achieved a proper result in this proceeding with a great saving in hearin time and expense to both the Government and to respondent.

WHEREFORE, for the reasons herinbefore given, it is ordered:

(A) The motion for approval of settlement filed on December 29, 198 is granted and the settlement agreements in each docket are approved.

(B) The motions for dismissal of the Proposals for Assessment of Ci Penalty are granted and the Proposals for Assessment of Civil Penalty in Docket Nos. KENT 79-264, KENT 79-265, and KENT 80-131 are dismissed to th extent that they seek assessment of civil penalties for the violations li below:

Docket No. KENT 79-264

Citation No. 712096 2/13/79 § 17.1725(a) (Tr. 80)

Docket No. KENT 79-265

Citation No. 712729 2/28/79 § 77.1301
Citation No. 712625 2/27/79 § 75.400
Citation No. 712627 2/27/79 § 75.512

Docket No. KENT 80-131

Citation No. 713948 5/15/79 § 75.1100-2(e)

(C) The Proposal for Assessment of Civil Penalty filed in Docket No. ENT 79-264 is dismissed to the extent that it seeks assessment of a civil enalty for a violation of section 75.303 because the Secretary failed to rove that a violation of section 75.303 occurred (Tr. 61).

(D) Pursuant to the settlement agreements and my bench decisions, sup espondent shall, within 90 days from the date of this decision, pay civil enalties totaling $3,096.00, of which an amount of $246.00 is attributable o penalties assessed in my bench decisions and the remaining amount of 2,850.00 is attributable to the settlement agreements hereinbefore describ nd approved. The penalties are allocated to the respective violations s follows:

Docket No. KENT 79-264

CONTESTED

Citation No. 712092 2/13/79 § 75.517	$	1.00
Citation No. 712094 2/13/79 § 75.303 (Dismissed)		--
Citation No. 712095 2/13/79 § 75.1725		50.00
Citation No. 712096 2/13/79 § 75.1725(a) (Dismissed)		--
Citation No. 712098 2/13/79 § 75.523		60.00
Citation No. 712099 2/13/79 § 75.400		35.00
Citation No. 712100 2/13/79 § 75.601		60.00
Citation No. 712703 2/13/79 § 75.200		40.00
Total Penalties Assessed in Bench Decisions	$	246.00

SETTLEMENTS

Docket No. KENT 79-264

Citation No. 712702 2/13/79 § 75.523	$	106.00
Citation No. 712704 2/13/79 § 75.517		90.00
Citation No. 712705 2/13/79 § 75.1722(b)		60.00
Citation No. 712706 2/13/79 § 75.313		17.00
Citation No. 712707 2/13/79 § 75.604		30.00
Citation No. 712708 2/13/79 § 75.604		30.00
Citation No. 712709 2/13/79 § 75.200		30.00
Citation No. 712710 2/13/79 § 75.503		20.00
Citation No. 712711 2/13/79 § 75.202		30.00
Citation No. 712714 2/13/79 § 75.202		30.00
Citation No. 712715 2/13/79 § 75.512		17.00
Citation No. 712716 2/13/79 § 75.316		12.00
Total Settlement Penalties in Docket No. KENT 79-264	$	472.00

Docket No. KENT 80-265

Citation No. 712717 2/13/79 § 75.1202	$
Citation No. 712718 2/13/79 § 75.316	
Citation No. 712724 2/22/79 § 75.516-1	
Citation No. 712729 2/28/79 § 77.1301 (Dismissed)	
Citation No. 712725 2/23/79 § 75.503	
Citation No. 712726 2/23/79 § 75.703	
Citation No. 712727 2/23/79 § 75.1303	
Citation No. 712728 2/23/79 § 75.1704	
Citation No. 712625 2/27/79 § 75.400 (Dismissed)	
Citation No. 712626 2/27/79 § 75.1306	
Citation No. 712627 2/27/79 § 75.512 (Dismissed)	
Citation No. 712628 2/27/79 § 75.1704-2(d)	
Citation No. 712629 2/27/79 § 75.1704	
Citation No. 712630 2/27/79 § 75.200	
Citation No. 712631 2/27/79 § 77.1001	
Citation No. 712632 2/27/79 § 77.1102	
Citation No. 712634 2/28/79 § 75.303	
Citation No. 712635 2/28/79 § 75.200	
Citation No. 712636 2/28/79 § 77.1104	
Total Settlement Penalties in Docket No. KENT 79-265	$

Docket No. KENT 79-370

Citation No. 712093 2/13/79 § 75.1100-1(a)	$
Order No. 712097 2/13/79 § 75.701	
Order No. 712701 2/13/79 § 75.512	
Total Settlement Penalties in Docket No. KENT 79-370	$

Docket No. KENT 80-131

Citation No. 712712 3/13/79 § 75.1704	$
Citation No. 712720 3/13/79 § 75.1100	
Citation No. 713477 5/15/79 § 75.523-2(c)	
Citation No. 713478 5/15/79 § 75.523-2(c)	
Citation No. 713479 5/15/79 § 75.1725	
Citation No. 713943 5/15/79 § 75.604	
Citation No. 713944 5/15/79 § 75.316	
Citation No. 713946 5/15/79 § 75.517	
Citation No. 713947 5/15/79 § 75.512	
Citation No. 713948 5/15/79 § 75.1100-2(e) (Dismissed)	
Citation No. 713949 5/15/79 § 75.1100	
Citation No. 713950 5/15/79 § 75.512	
Citation No. 713951 5/15/79 § 75.1100-2	
Citation No. 714902 5/15/79 § 75.200	
Citation No. 714903 5/15/79 § 75.503	
Citation No. 714904 5/15/79 § 75.503	
Citation No. 714878 5/15/79 § 75.200	
Total Settlement Penalties in Docket No. KENT 80-131	$
Total Settlement Penalties in This Proceeding	$2,
Total Civil Penalties Assessed in This Proceeding	$3,

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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MAY 29 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. WEVA 80-663
	:	A.O. No. 46-02208-03046
v.	:	Docket No. WEVA 80-624
	:	A.O. No. 46-02208-03044
DAVIS COAL COMPANY, Respondent	:	Docket No. WEVA 80-635
	:	A.O. No. 46-02208-03045V
	:	Docket No. WEVA 80-589
	:	A.O. No. 46-02208-03040
	:	Marie No. 1 Mine

DECISION AND ORDER

Relying heavily on the Commission's prior approval of settlements that permitted a 90% reduction in penalties, 1/ the parties initially proposed settlement of three of the captioned matters at a 25% reduction This was rejected on the ground that the operator's history of prior violations shows token penalties are no deterrant to serious violations by this operator 2/ and because Commissioner Lawson, Judge Melick and this trial judge found Davis' claims of financial impairment unpersuasive. See, Order Denying Settlement, issued November 12, 1980. Compare, Davis Coal Company, 2 FMSHRC 3053, 3067-68 (Melick, J. 1980); Davis Coal Company, 2 FMSHRC 18 (Kennedy, J. 1980); Davis Coal Company, 2 FMSHRC 619, 620 (Dissenting Opinion of Lawson, Commissioner).

The matter is before me now on the operator's unopposed request to reconsider my order denying the motion to approve settlement together with renewed motion to approve settlement of the 21 violations charged in all four of the captioned matters at 90% of the amounts initially assessed.

1/ Davis Coal Company, 2 FMSHRC 619 (1980).

2/ As I have noted, "While the Act requires that adverse business impact be 'considered', it does not require that it be given controllin weight or that it cannot be outweighed by the countervailing interest i continuing in business only those mining operations that promote mine safety." Davis Coal Company, supra, 2 FMSHRC 18, n. 1.

As the record shows, prior to 1980 Davis Coal Company enjoyed what amounted to a prescriptive right to violate the Act with impunity. This was based on its ability to persuade MSHA that a small operator who exploits his mineral leases through the cover of a proprietary, non-profit corporation is per se a candidate for a substantial (usually 90%) remission of the penalties assessed. And this, despite the fact that the proprietors (Mr. and Mrs. Davis) paid themselves handsome salaries and provided, tax free and at the expense of the corporation, all the prerequisites and amenities usually associated with the truly rich. This is not to suggest there is anything improper or illegal about the Davis operation. Only that an uncritical acceptance of Davis' plea of poverty has served to continue in business and to encourage what is clearly a marginally safe operation. In this connection, Mr. Davis has furnished for the record his personal pledge to give immediate attention to correction of the many conditions and practices in his operation that result in serious safety violations and "to significantly reduce future MSHA violations". This statement will be made a part of the record in this proceeding and will be available as a measure of Mr. Davis' good faith efforts to achieve compliance in future proceedings.

Based on an independent evaluation and de novo review of the circumstances, including an evaluation of the operator's solvency, and his personal pledge to improve compliance, I find the settlement proposed is in accord with the purposes and policy of the Act. To have brought Davis to the point where he is willing to settle on the basis of payment of 90% instead of a reduction of 90% reflects a commendable improvement in attitude on his part and a victory for more effective enforcement on the Commission's part. Davis still has a long way to go, but at least for the purpose of this settlement, I am persuaded he is sincere and intends to improve significantly his record of compliance.

A final word is warranted with respect to the financial data furnished. A careful examination of the operator's comparative statement of assets and liabilities for 1979 and 1980 as well as its comparative statement of income and expenses for the same period dramatically demonstrates the fallacy of the claim that the absence of profit or taxable income is a reliable indicator of a small operator's inability to pay substantial penalties and still continue in business. Davis has successfully operated without showing a profit since 1976. The fact that the company apparently walks on water is explained by its ability to finance its high debt load with a healthy cash flow and an extended line of credit from the Bank of Pikeville, its silent partner.

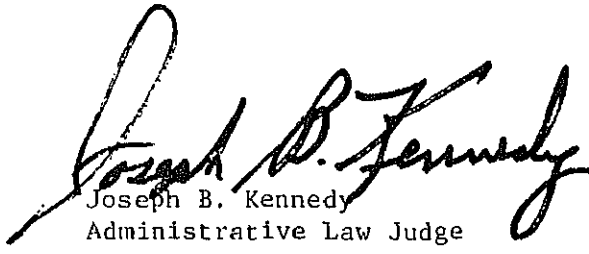
Thus, the comparative statements and tax returns both corporate and individual show the principal stockholder and his wife paid themselves salaries in 1980 totalling $75,000, have outstanding non-interest bearing loans totalling almost $250,000 and own stock in another closely held corporation worth almost $140,000. The profits or earnings retained by the corporation to avoid the tax on dividends increased from $563,761 in 1979 to $867,499 in 1980. This resulted in almost doubling the net

worth of the corporation which as of December 31, 1980 was $842,498. A measure of the success of the technique of using the proprietary corporation as an individual tax shelter is shown by the fact that the Davis' joint federal tax return shows they took no individual deductions against a taxable income of $71,261 in 1979.

The comparative statements also show the operator has a cash flow of almost $3,000,000 a year, that its long term liabilities are only $260,533 and that the book value of its fixed assets are $940,168. Finally a comparison of Davis' cash flow to its total debt shows a favorable ratio of 1.5 to 1. 3/

I conclude, therefore, that the Davis Coal Company is a highly solvent and profitable operation for its owners and the Bank and merits no more or less consideration in the assessment of penalties than any of its highly profitable publicly held competitors.

The premises considered, it is ORDERED that the motion to approve settlement be, and hereby is, GRANTED. It is FURTHER ORDERED that the penalties be allocated on the basis of 90% of the amounts initially assessed and that the operator pay the total amount of the settlement agreed upon, $3,720, within forty-five (45) days of the date of issuance of this order. Finally, it is ORDERED that, subject to payment, the captioned matters be DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

3/ Accounting research shows this is one of the most reliable predictors of financial success or failure. Beaver, "Financial Ratios As Predictors of Failure", Supp. to Vol. 4, Journal of Accounting Research, pp. 71-127 (1966).

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